Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1994

THE GILLETTE COMPANY,

Petitioner,

vs.

MICHIGAN DEPARTMENT OF TREASURY,

Respondent.

Petition For A Writ Of Certiorari To The Michigan Court Of Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does a State Appellate Court violate the procedural due process rights of a litigant by affirming judgment against that litigant only on a ground first raised *sua sponte* by the State Appellate Court after the close of the appellate proceeding and without notice to the litigant and without any opportunity for the litigant to be heard in its defense and thereafter denies rehearing?

2. Can a State Appellate Court disregard that State's long-standing taxing jurisdictional standard and retroactively 17 years impose a different and stricter standard only on the litigant before it, while the State intentionally, systematically and arbitrarily applies the State's long-standing, and more favorable, jurisdictional test to all other similarly situated taxpayers for the contested tax years?

3. Does a State Appellate Court violate the due process rights of a litigant by the unforeseeable, *sua sponte*, 17 year retroactive application of civil tax liability and potential criminal tax liability under a different and stricter jurisdictional standard than previously had been uniformly applied by the State for the contested tax years?

LIST OF PARTIES AND RULE 29.1 LIST

The parties to the proceedings below were the petitioner, The Gillette Company, and the respondent, Michigan Department of Treasury.

The respondent before this Court is the Department of Treasury, State of Michigan.

Petitioner The Gillette Company's Rule 29.1 list of parent companies, subsidiaries (except wholly-owned subsidiaries) and affiliates:

The Gillette Company (Parent Company)
Indian Shaving Products Limited
Shenmei Daily Use Products Limited Company
Gillette (Shanghai) Limited
Interpak Shaving Products Limited
Gillette Egypt S.A.E.
Wizamet S.A.
Gillette France S.A.
Waterman S.A.

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The petitioner, The Gillette Company ("Gillette"), respectfully prays that a writ of certiorari issue to review the final decree and opinion of the Michigan Court of Appeals, entered in this action on March 1, 1993.

OPINIONS BELOW

The Michigan Court of Appeals Opinion is reported as, *The Gillette Company v. Department of Treasury,* 198 Mich. App. 303, 497 N.W.2d 595 (1993), and is reprinted as Appendix A (App. 1).

JURISDICTION

The Michigan Court of Appeals denied Gillette's timely motion for rehearing on May 18, 1993. The motion and brief in support are reprinted as Appendix B (App. 19). The Court's order denying Gillette's motion for rehearing is reprinted as Appendix C (App. 68).

Gillette filed a timely application for leave to appeal with the Michigan Supreme Court on June 8, 1993. The application for leave to appeal is reprinted as Appendix D (App. 69). The Supreme Court denied leave to appeal on April 19, 1994. The Supreme Court's Order is reprinted as Appendix E (App. 144).

Gillette timely filed a motion for reconsideration with the Supreme Court on May 10, 1994. Gillette's motion for reconsideration and brief is support thereof are reprinted as Appendix F (App. 145). The Supreme Court denied Gillette's motion for reconsideration on July 29, 1994. The Supreme Court's Order is reprinted as Appendix G (App. 177).

Gillette invokes the jurisdiction of this Court under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This action involves the Due Process and Equal Protection Clauses of the United States Constitution, U.S. CONST, Am 14, § 1.

STATEMENT OF THE CASE

Michigan enacted its "Single Business Tax" effective January 1, 1976 (MCL 208.1, *et seq*; MSA 7.558(1), *et seq*) (the "SBT Act"). The SBT Act, a modified value added tax,[1] replaced a corporate income tax. Under that corporate income tax, operating through four divisions,[2] Gillette, in 1973, determined that it would restrict its activities to those permissible as sales solicitation under PL 86-272 (codified as 15 U.S.C. 381)[3]. The Michigan Department of Treasury ("Department") audited Gillette for the years 1974 and 1975, and concluded that PL 86-272 precluded the imposition of the Michigan corporate income tax.[4] The Michigan Department, as part of the same audit, however, concluded PL 86-272, applicable only to income taxes, did not apply to the SBT Act, and assessed a deficiency against Gillette for the year 1976. Subsequent SBT Act assessments, consolidated for trial in this matter, added the years 1977 through 1981.

During the exhaustion of Gillette's administrative remedies, and before the assessments at issue were finalized, the Department concluded that it would, as a matter of administrative policy, apply PL 86-272 as the jurisdictional test under the SBT Act. This determination was confirmed by the Department in its Single Business Tax Bulletin 1980-1 (Appendix I, App. 181) and subsequently reconfirmed in its

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[1] *Trinova Corp.* v. *Michigan Department of Treasury*, 498 U.S. 358 (1991).

[2] Gillette, North America; Safety Razor; Personal Care and Paper Mate.

[3] PL 86-272 is federal legislation which prohibits a state from imposing an income tax on persons engaged in interstate commerce if the only activity carried on in the state is the "solicitation of orders". (Appendix H, App. 179).

[4] In 1978, the New York Court of Appeals, affirming the appellate division, reached a similar conclusion with respect to Gillette's New York activities under PL 86-272. *The Gillette Co.* v. *State Tax Commission*, 393 N.Y.Supp.2d 196, 56 App. Div.2d 475 (3d Dept., 1977), *aff'd* 410 N.Y.Supp.2d 65, 484 N.Y.2d 846, 392 N.E.2d 764 (1978).

Revenue Administrative Bulletin 89-46 Jurisdictional Standard. (Appendix J, App. 186). The Department nevertheless finalized and issued the 1976 to 1981 SBT Act assessments, asserting that Gillette's activities exceeded that "solicitation" permitted by PL 86-272.

Gillette verified that the Department, with the burden of establishing jurisdiction to tax, had uniformly applied PL 86-272 as the SBT Act jurisdictional test, eliciting reconfirmation of this uniform practice in the Department's answer to Gillette's petitions (Appendix K, App. 194), in the Department's answers to Gillette's interrogatories (Appendix L, App. 198), and in request/demand for admissions by the Department (Appendix M, App. 202). The parties' prehearing statements (Appendix N, App. 203), their prehearing briefs, their opening statements, the proofs offered at trial, and their closing statements before the Michigan Tax Tribunal, all looked to PL 86-272 as the sole jurisdictional test to be applied. The Tax Tribunal held that Gillette's activities exceeded that solicitation permitted by PL 86-272, and affirmed the assessments. (Appendix O, App. 206). Gillette appealed as of right to the Michigan Court of Appeals. The jurisdictional test briefed and argued by the parties, was the PL 86-272 test applied by the State as an administrative policy for more than 17 years. (Appendix P, App. 229).

The Michigan Court of Appeals, on March 1, 1993, issued its Opinion finding PL 86-272 applicable only to income taxes and not to Michigan's SBT Act, adopting instead a different, constitutional jurisdiction test.[5] The Court of Appeals, stating the applicable jurisdictional test issue had not been briefed or argued by the parties (App. 5-6), apparently did not realize that the Department had for nearly two decades been following its policy of uniformly applying PL 86-272 as the SBT Act jurisdictional test. Consequently, the Court of Appeals, acting *sua sponte* and without permitting the parties an opportunity to brief or argue the issue, ordered

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[5] The Court of Appeals decision is reported as 198 Mich App 303, 497 N.W.2d 595 (1993), App. 1.

a jurisdictional test applied 17 years retroactively to Gillette, different than the jurisdictional test the Department had repeatedly admitted it had uniformly applied.[6] While Gillette believes that if the Court had properly applied the PL 86-272 test it would have reversed the Tax Tribunal's conclusion that the Department had met its burden of proving jurisdiction under PL 86-272,[7] under the new test announced by the Court of Appeals and applied solely to Gillette, the Department clearly had jurisdiction to tax.

Gillette moved for rehearing in the Court of Appeals, calling its attention to its apparent misunderstanding as to the applicable jurisdictional test, and noting that the Court's decision, applying a different jurisdictional test than that uniformly administratively applied by the Department for over 17 years, violated Gillette's Fourteenth Amendment rights; an

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[6] The Michigan Court of Appeals action, in ordering *sua sponte* a different jurisdictional test for Gillette, cannot be justified because it did so in apparent ignorance, notwithstanding abundant information in the record to forewarn it of the existence of the long standing PL 86-272 jurisdictional policy. Regardless of the wisdom of acting *sua sponte*, injecting an issue not briefed or argued by the parties and refusing them permission to brief or argue it, on motion for rehearing, the Court of Appeals was informed of the longstanding State policy, the benefits of which its decision had denied Gillette. This was not an action taken "by mistake", or "inadvertently," but rather one, in this context, intentionally and deliberately taken with full knowledge of the long-standing, administrative policy which it was denying Gillette.

[7] After oral arguments in the Court of Appeals, but before the Court issued its decision, this Supreme Court issued its decision in *Wisconsin Department of Revenue* v. *Wrigley, Co.*, ___ U.S. ___, 112 S.Ct. 2447 (1992). The *Wrigley*, decision involved the first construction of the critical "solicitation of orders" language in PL 86-278. Gillette filed a supplemental brief with the Court of Appeals, bringing the recent decision to its attention. Under the test adopted by this Supreme Court in *Wrigley*, Gillette believes its activities in Michigan came well within the PL 86-272 permissible activities as determined by this Supreme Court.

issue not pertinent until the Court of Appeals' unpredictable and mistaken *sua sponte* adoption of the new and different jurisdictional test. (App. 19). Rehearing was denied without comment. (App. 68).

Gillette applied for leave to appeal to the Michigan Supreme Court, raising these same constitutional issues. (App. 69). Leave to appeal was denied. (App. 144). Gillette moved for reconsideration in the Supreme Court, arguing that the Court of Appeals' *sua sponte* injection in its Opinion of a new and dispositive issue, without permitting Gillette to address or assert its defenses to the surprise issue deprived Gillette of its right to a fair hearing and an opportunity to defend itself against the State's assertion of taxation jurisdiction, in violation of Gillette's procedural Due Process rights. Further, Gillette argued that the Court of Appeals' new jurisdictional test, applied 17 years retroactively to Gillette alone, deprived Gillette of its rights to Due Process and Equal Protection under the Michigan and United States Constitutions. (App. 145). On June 2, 1994, Gillette filed a supplemental brief in support of its motion for reconsideration, notifying the Supreme Court that it had just learned that notwithstanding the Court of Appeals' Order applying the new SBT Act jurisdictional test to Gillette for the contested tax years 1976 through 1981, the Department had announced to over a thousand similarly situated potential taxpayers, who had never filed tax returns under the SBT Act, that if they would file returns under the new jurisdictional test *for the period 1989 to date*, the Department would not apply it retroactively to them during the tax years contested by Gillette, 1976 through 1981. (Appendix Q, App. 230). This offer was not extended to Gillette. The Supreme Court denied Gillette's motion for reconsideration without comment on July 27, 1994. (App. 177). Gillette prays that a writ of certiorari issue to review the decision of the Michigan Court of Appeals.[8]

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[8] Gillette also brought suit against the Treasurer and Revenue Commissioner of the State of Michigan, in their official capacities, in the United

REASONS FOR GRANTING THE WRIT

I.

THE AFFIRMANCE OF JUDGMENT AGAINST GILLETTE, ON A GROUND FIRST RAISED *SUA SPONTE* BY THE STATE APPELLATE COURT AFTER THE CLOSE OF THE PROCEEDING AND WITHOUT NOTICE TO GILLETTE OR ANY OPPORTUNITY FOR IT TO BE HEARD IN ITS DEFENSE, WAS CLEARLY AND DIRECTLY CONTRARY TO THE PREVIOUSLY SETTLED DUE PROCESS JURISPRUDENCE OF THIS COURT

The unforeseeable, unilateral action of the Michigan Court of Appeals, together with the steadfast refusal of the Michigan appellate courts to hear Gillette on the improprieties and unlawful consequences of such action, flies in the face of this Court's long-settled interpretation of the guarantees of the Due Process Clause of the Fourteenth Amendment. Certiorari must be granted to reaffirm this Court's Due Process jurisprudence and to rectify this clear and unjustifiable violation of Gillette's fundamental Due Process rights by the Michigan appellate courts.

States District Court for the Eastern District of Michigan (Docket No. 94-DT-73427-CV), seeking to enjoin the collection of the SBT Tax. Gillette argued that because of the Court of Appeals' decision, *sua sponte* imposing a new jurisdictional theory as to which the Michigan Courts refused to accord Gillette a hearing or opportunity to argue or brief, Gillette had been denied its Fourteenth Amendment procedural Due Process rights to notice and hearing before being deprived of its property. (See discussion infra, pp 6-12.) The Federal District Court held it had no jurisdiction, that this was a matter which must be resolved through the appellate process, specifically by writ of certiorari to this Supreme Court. It did not address Gillette's argument that it had been denied a hearing as to the dispositive issue *sua sponte* injected by the Michigan Court of Appeals after it was too late for Gillette to correct the Court of Appeals' misunderstanding of the facts and to alert the Court that its order would violate Gillette's Fourteenth Amendment constitutional rights. Gillette has filed an appeal to the Court of Appeals for the Sixth Circuit (Docket No. 94-2022).

The Michigan Court of Appeals – acting *sua sponte* and after Gillette's only appeal of right had been argued and submitted to that court, and without additional briefs or argument – determined that Gillette was subject to taxation by Michigan under a jurisdictional standard that the Department had neither advanced in the Court of Appeals nor anywhere else in the preceding 13 years. Gillette was wholly and intentionally deprived of any notice that it would be subjected to taxation under the standard first adopted and then retroactively applied by the Michigan appellate court; and Gillette was wholly and intentionally denied any opportunity to brief or argue the state or federal issues created by this unilateral and uninformed action of the Michigan Court of Appeals. And the Michigan appellate courts persisted in their refusal to provide Gillette an opportunity to be heard, denying the motion for rehearing presented to the Court of Appeals and the application for leave to appeal and motion for reconsideration in the Michigan Supreme Court. The conduct of the Michigan appellate courts violated the rights secured to Gillette by the Due Process Clause of the Fourteenth Amendment as clearly and repeatedly recognized in the jurisprudence of this Court.

This Court has repeatedly admonished that the Due Process Clause requires, at a minimum, "that deprivation of life, liberty or property by adjudication be **preceded** by notice and an opportunity for hearing appropriate to the nature of the case," *Mullane* v. *Central Hanover Trust Co.*, 339 U.S. 306, 313 (1950) (emphasis added), and the constitutionally required hearing must be "granted at a meaningful time and in a meaningful manner." *Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965). *See Boddie* v. *Connecticut*, 401 U.S. 371, 377-78 (1971); *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 437 (1982). In *Shelley* v. *Kraemer*, 334 U.S. 1, 16 (1948), this Court recounted that "the action of state courts in imposing penalties or depriving parties of other substantive rights without providing adequate notice and opportunity to defend, has, of course, long been regarded as a denial of the due process of law guaranteed by the Fourteenth Amendment." The conduct

of the Michigan courts inexplicably departs from the body of this Court's Due Process jurisprudence.[9]

The instant case parallels *Brinkerhoff-Faris Trust & Savings Company* v. *Hill*, 281 U.S. 673 (1930), where this Court concluded that the Due Process Clause would not abide the collection of a tax assessment under quite similar circumstances and reversed the dismissal of an action to enjoin the collection of the tax. In *Brinkerhoff-Faris*, the Missouri Supreme Court had concluded that the taxpayer was barred by the doctrine of laches from challenging a tax assessment because a remedy was available before the state's tax commission. This Court observed, "The possibility of relief before the Tax Commission was **not suggested by anyone in the entire litigation** until the [Missouri] Supreme Court filed its opinion on June 29, 1929. Then it was too late for the plaintiff to avail itself of the newly found remedy." *Id.* at 677 (emphasis added). The taxpayer then petitioned for rehearing, asserting that by retroactively requiring resort to a previously nonexistent remedy the Missouri Supreme Court had violated its rights under the Due Process Clause of the Fourteenth Amendment. As in the instant case, the petition for rehearing was denied without comment. This Court found that the taxpayer's Due Process claim "was timely, since it was raised at the first opportunity." *Id.* at 678 (citing *Missouri ex rel. Missouri Ins. Co.* v. *Gehner*, 281 U.S. 313, 320 (1930)),[10] and

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[9] *See Windsor* v. *McVeigh*, 93 U.S. 274, 277 (1876) ("Wherever one is assailed in his person or his property, there he may defend."); *Hovey* v. *Elliott*, 167 U.S. 409, 417 (1987) ("due process of law signifies a right to be heard in one's defence.") *See also Boddie v. Connecticut*, 401 U.S. 371, 377 (1971), and cases cited in n.3.

[10] *See also Herndon* v. *Georgia*, 295 U.S. 441, 444 (1935): "There is no doubt that the federal claim was timely if the ruling of the state court could not have been anticipated and a petition for rehearing presented the first opportunity for raising it." (citing *Saunders* v. *Shaw*, 244 U.S. 317, 320 (1917); *Ohio* v. *Akron Park District*, 281 U.S. 74, 79 (1930); *Missouri ex rel. Missouri Ins. Co.* v. *Gehner*, 281 U.S. 313, 320 (1930); *Brinkerhoff-Faris Trust & Savings Company* v. *Hill*, 281 U.S. 673, 677-78 (1930);

proceeded to conclude that the taxpayer had been subjected to compound violations of its Due Process rights.

This Court initially concluded: "It is plain that the practical effect of the judgment of the Missouri court is to deprive the plaintiff of property without affording it at any time an opportunity to be heard in its defense." 281 U.S. at 678. This Court reiterated that "[t]he federal guaranty of due process extends to state action through its judicial as well as its legislative, executive or administrative branches of government," *id.* at 680, and admonished:

> We are not concerned with the rights of the plaintiff on the merits, although it may be observed that the plaintiff's claim is one arising under the federal constitution and, consequently, one on which the opinion of the state court is not final; . . . Our present concern is solely with the question whether the plaintiff has been accorded due process in the primary sense – whether it has had an opportunity to present its case and be heard in its support . . . Whether acting through its judiciary or through its legislature, a state may not deprive a person of all existing remedies for the enforcement of a right, which the state has no power to destroy, unless there is, or was, afforded to him some opportunity to protect it. *Id.* at 681-82.[11]

American Surety Co. v. *Baldwin*, 287 U.S. 156, 164 (1932); *Great Northern Ry.* v. *Sunburst Oil Co.*, 287 U.S. 358, 367 (1932)).

[11] Earlier, in *Saunders* v. *Shaw*, 244 U.S. 317 (1917), this Court determined that the Louisiana Supreme Court deprived a taxpayer of Due Process by rendering an unforeseeable judgment and denying the defeated party an opportunity to present evidence material to the basis of that judgment. *Saunders* involved a drainage tax, which was successfully defended by the petitioner in the trial court and initially affirmed by the state supreme court. *Id.* at 318-19. The state supreme court thereafter granted rehearing; reversed its judgment on the basis of factual matters that had been excluded at trial; and denied the petitioner an opportunity on rehearing to present material evidence. *Id.* at 319. This Court reversed the state supreme court, admonishing:

As in *Brinkerhoff-Faris*, Gillette has been subjected to taxation under a standard "**not suggested by anyone in the entire litigation**" until the Michigan Court of Appeals filed its opinion. *Id.* at 677. Gillette had every reason to anticipate a decision based on the PL 86-272 issue, which had been litigated by these parties for more that fifteen years.[12] Gillette could not have anticipated that the Michigan Court of Appeals would abandon the only jurisdictional issue briefed and argued by the parties and interject, *sua sponte*, a new standard

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> [W]hen the act complained of is the act of the Supreme Court, done unexpectedly at the end of the proceeding, when [petitioner] no longer had any right to add to the record, it would leave a serious gap in their remedy for infraction of constitutional rights if the party aggrieved in such a way could not come here. The [petitioner] was not bound to contemplate a decision of the case before the evidence was heard and therefore was not bound to ask a ruling or take other precautions in advance.

Id. at 320. *See also Georgia Railway & Electric Co.* v. *Decatur*, 295 U.S. 165, 171 (1935) (refusal of the court to receive and consider proofs on the controlling issue "amounts to a denial of a hearing on that issue, in contravention of the due process of law clause of the Constitution.").

[12] Gillette did not merely "assume" the State's adoption of the PL 86-272 jurisdictional standard. While that standard was announced by the State in its Single Business Tax Bulletins (App. 181, 186), and was intentionally and uniformly applied by the Department of Treasury, Gillette verified the applicable standard in several ways. Gillette verified the uniform application of PL 86-272 by eliciting an admission in the State's answer to its petition (App. 194) in interrogatory answers (App. 198) in a demand for admissions (App. 202) and, at trial, through the testimony of the Deputy Revenue Commissioner and the Administrator of the Single Business Tax (Appendix R, App. 248). Gillette could have done nothing more.

Further, Gillette believed under the Michigan and Federal Constitutions it was entitled to uniform and equal treatment, requiring the State to apply the same jurisdictional test to it that the State had repeatedly admitted it had applied and was applying to all others similarly situated. The Michigan Department of Treasury, represented by its Attorney General, obviously agreed.

never advanced by the Department of Treasury. There is no dispute that Gillette was never permitted a hearing before any Michigan court on any of the issues attending whether the appropriate jurisdictional standard for imposing SBT liability was the PL 86-272 standard or the less stringent jurisdictional standard interjected, *sua sponte*, and retroactively applied by the Michigan Court of Appeals against Gillette. The fact that the Michigan Court of Appeals apparently misunderstood that the basis for the 17 year uniform State reliance upon the PL 86-272 jurisdictional standard was seated in administrative policy and legislative acquiescence, coupled with the discrimination its decision accomplished against Gillette, illustrates the harm which can be done when a court acting *sua sponte* denies the parties an opportunity to address a "new theory" relied on by the court as dispositive.

Gillette, having been retroactively subjected to a standard against which it could never argue, is in no better position than the *Brinkerhoff-Faris* taxpayer that was unsuited by the retroactive recognition of a remedy it could never use. As in *Brinkerhoff-Faris*, "[i]t is plain that the practical effect of the judgment of the [Michigan Court of Appeals] is to deprive the plaintiff of property without affording it at any time an opportunity to be heard in its defense." 281 U.S. at 678. *See Bouie* v. *City of Columbia*, 378 U.S. 347, 354 (1964) ("When a state court overrules a consistent line of procedural decisions with the retroactive effect of denying a litigant a hearing in a pending case, it thereby deprives him of due process of law 'in its primary sense of an opportunity to be heard and to defend [his] substantive right.' " (quoting *Brinkerhoff-Faris*, 281 U.S. at 678)).[13]

Without review in this Court, Gillette faces the deprivation of its property in the complete absence of notice and a

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[13] *See also Dunn* v. *U.S.*, 442 U.S. 100, 106 (1979) ("Few constitutional principles are more firmly established than a defendant's right to be heard on the specific charges of which he is accused."); *U.S.* v. *Baker*, 807 F.2d 1315, 1323 (6th Cir. 1986) ("One of the most fundamental requirements of due process is that an individual must receive adequate notice of the charges or claims being asserted against him.").

meaningful opportunity to be heard, in clear contravention of this Court's previously settled interpretation of the minimum procedural guarantees required by the Due Process Clause of the Fourteenth Amendment. The rights of Gillette and the integrity of this Court's Due Process jurisprudence must be protected from the neglectfulness and indifference of the Michigan appellate courts.[14]

II.

THE MICHIGAN COURT OF APPEALS' OPINION, DISREGARDING THE STATE'S 17-YEAR OLD ADOPTION OF PL 86-272 AS ITS JURISDICTIONAL STANDARD UNDER THE SINGLE BUSINESS TAX ACT, AND THE STATE'S INTENTIONAL, SYSTEMATIC AND ARBITRARY APPLICATION OF A DIFFERENT, LESS ADVANTAGEOUS JURISDICTIONAL TEST TO ONLY GILLETTE DURING THE CONTESTED TAX YEARS, VIOLATED GILLETTE'S CONSTITUTIONAL RIGHT TO EQUAL PROTECTION OF THE LAW

This case arises because the Michigan Court of Appeals, misunderstanding the facts and refusing to permit briefs or argument on the constitutional consequences of its *sua sponte* actions, ordered a new SBT Act jurisdictional test applied 17 years retroactively to a single taxpayer, ignoring the PL 86-272 jurisdictional test which had been adopted and uniformly applied by the Department and acquiesced in by the legislature for 13 years. The Equal Protection issue is whether a State Court, hearing a state tax appeal, can *sua sponte* refuse to apply long-standing and established State law to the litigant before it – when that law was, is and continues to be uniformly applied to all other persons.

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[14] *See Ohio Bell Telephone Co.* v. *Public Utilities Commission of Ohio*, 301 U.S. 292, 305 (1937) ("There can be no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harassing delay, when that minimum requirement has been neglected or ignored.").

Before issuing its finalized assessments against Gillette, the Department declared to the world that it would apply PL 86-272 as its SBT Act jurisdictional test. The Michigan Legislature for more than 13 years acquiesced in the PL 86-272 standard.[15] The Michigan Court of Appeals in 1993, however, refused to apply this long-standing and established policy and instead imposed retroactively for more than 17 years, on Gillette alone, a different and much less advantageous jurisdictional standard.

The new jurisdictional standard ordered by the Michigan Court of Appeals permitted the State to tax in instances when the old would not. Gillette cannot dispute the State's jurisdiction to tax under the Court's new standard, but, after prevailing on this issue in the New York Court of Appeals[16] and after this Supreme Court's decision in *Wrigley*,[17] believed it was not taxable under the long-standing PL 86-272 test.

The Court of Appeals singled Gillette out for less favorable treatment under Michigan's SBT Act and effectively created a class of one. Gillette stands alone during the contested 1976-1981 tax years, as the only person against whom Michigan has asserted SBT Act jurisdiction under the Court of Appeals' test. All others were tested by the more lenient and more favorable PL 86-272 test.

Michigan's adoption of the PL 86-272 test as an administrative policy was long-standing and was acquiesced in by the Michigan Legislature. Such long-standing practice has been recognized by this Court as establishing state law for Equal Protection purposes. In *Allegheny Pittsburgh Coal Co.* v. *Webster County*, 488 U.S. 336, 345 (1989), this Court recognized " . . . that the State may have adopted a different system

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[15] The Single Business Tax was amended over 45 times during the 1976-1993 interim, yet not once did the legislature in the course of its "revision of tax laws to distribute increased costs of government among its taxpayers in the light of present need for revenue" suggest a different jurisdictional test be applied. (see *Welch* v. *Henry*, fn. 34, *infra*)

[16] See fn 4, *supra*.

[17] See fn 7, *supra*.

in practice from that specified by statute; we have held that such a system may be valid so long as the implicit policies are applied evenhandedly to all similarly situated property within the State. *Nashville C. & S.L.R. Co.* v. *Browning*, 310 U.S. 362, 368-369 (1940)."

In the *Nashville* case, where an administrative practice was challenged, this Court noted that had it been a legislative classification, it would clearly pass constitutional muster. And so holding, this Court stated,

> It would be a narrow conception of justice to confine the notion of 'laws' to what is found written on the statute books, and to disregard the laws which life has written upon it. *Settled state practice* cannot supplant constitutional guarantees, but it *can establish what is state law. . . . deeply imbedded traditional ways of carrying out state policy*, such as those of which petitioner complains, are often tougher and truer law than the dead words of the written text. . . . So we are of opinion that such a discrimination, not invidious but long-sanctioned and indeed conventional, would not be offensive to the Fourteenth Amendment simply because Tennessee reached it by a circuitous route. It is not the Fourteenth Amendment's function to uproot systems of taxation inseparable from the state's tradition of fiscal administration and ingrained in the habits of its people. 310 U.S. at 369-370 (emphasis added).

Michigan's long-standing application of PL 86-272 as its jurisdictional test was the established law in Michigan. Gillette was, accordingly, by the Court of Appeals' decision, deprived of equal protection under this established law.

The Equal Protection Clause of the Fourteenth Amendment protects the individual from state action which singles him out for discriminatory treatment by subjecting him to taxes not imposed on others of the same class.[18] The right is

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[18] The State is not bound to an "iron rule of equality", but classification for tax purposes must rest upon some ground of difference or having a fair and substantial relation to the object of the legislation." *Allied Stores of Ohio* v. *Bowers*, 358 U.S. 522, 526-527 (1959).

the right to equal treatment. *Hillsborough* v. *Cromwell*, 326 U.S. 620, 623 (1946) See also, *Allegheny Pittsburgh Coal Co.* v. *Webster County*, 488 U.S. 336, 445 (1989); *Sunday Lake Iron Co.* v. *Township of Wakefield*, 247 U.S. 350, 352-253 (1918); *Sioux City Bridge Co.* v. *Dakota County*, 260 U.S. 441, 445-446 (1923); *Cumberland Coal Co.* v. *Board of Tax Revision*, 284 U.S. 23, 28-29 (1931); *Iowa Des Moines National Bank* v. *Bennett*, 284 U.S. 239, 247 (1931).

Gillette alone, of a large class of potential SBT taxpayers, has been singled out for the retroactive imposition of over a million dollars in taxes on a different and much more disadvantageous jurisdictional theory than that applied to all others in its class. This was not accomplished by the legislature as part of some considered legislative policy. This was accomplished by the Michigan Court of Appeals, declaring Gillette retroactively taxable under a new and disadvantageous jurisdictional theory. Gillette stands alone, a class of one.

Even if the long-standing PL 86-272 policy was not the "law" to which Gillette is entitled to equal protection, nevertheless Gillette is still entitled to equal treatment under whatever law is applicable. The record before the Court of Appeals unquestionably established that all others similarly situated had benefitted from the Department's uniform administration of the PL 86-272 test, upon which Gillette had relied. The Court of Appeals had full knowledge that it was ordering disparate treatment for Gillette.

Notwithstanding the fact that the period of limitations has not run,[19] the State as a practical matter could not assert this new theory against all others similarly situated.[20]

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[19] The period of limitations does not begin to run until tax returns are filed. MCL 205.27a, MSA 7.657(27A).

[20] In most instances, a court's order would bind the taxpayer-party to that suit for all years before the court, and the new court ordered construction would be applied by the administrators of the state tax to all other persons to whom the applicable period of limitations would permit. Here, where the others similarly situated are persons which did not file tax

Seventeen years is simply too far back.[21] This blatantly discriminatory result should have been apparent to the Court of Appeals, and would have been argued had that Court not acted *sua sponte*, refusing briefs, argument and Gillette's motion for rehearing.

Even, assuming arguendo, the jurisdictional test applied by the Michigan Court of Appeals was correct in the circumstances in this case, Gillette is nevertheless entitled to be assessed under the same jurisdictional theory as all other similarly situated taxpayers. It is not Gillette's burden to force the State to apply the same jurisdictional tax test to all others similarly situated in 1976. This point has long been established by this Court.[22] In *Sioux City Bridge Co.* v. *Dakota County*, 260 U.S. 441 (1983), this Court unequivocally rejected the assertion that the taxpayer who was correctly assessed cannot argue for equality with those who were incorrectly assessed.[23] This point was also made in *Sunday Lake Iron*, 247 U.S. 350, a case originating in Michigan.

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returns under the PL 86-272 longstanding jurisdictional test, the period of limitations has not yet begun to run. All others relying on the longstanding PL 86-272 jurisdictional test are still open to retroactive assessment.

[21] As was recently recognized in *McKesson Corp.* v. *Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18, 40 n.23 (1990), in terms of the retroactive application of a new tax law construction, there is a practical limit on how far back the State can, acting in good faith, expect to locate enough taxpayers to make the tax levy more than a meaningless exercise. Seventeen years back is simply too far. Books and records would no longer be available, witnesses would have moved or would be deceased. No new and unexpected tax can be uniformly imposed 17 years retroactively.

[22] See, *Iowa Des Moines Bank* v. *Bennett, supra*; *Cumberland Coal Co.* v. *Board of Revision*, 284 U.S. 23 (1931); *Sioux City Bridge Co.* v. *Dakota County*, 260 U.S. 441 (1923).

[23] There the taxpayer's property had been assessed at 100% of its true cash value, while others similarly situated had been assessed at 55%. This Court held that the Equal Protection Clause required that the taxpayer's property be assessed at the lesser percentage of assessment, even though it was a departure from the requirement of the state statute.

The Michigan Court of Appeals, ordering a different retroactive jurisdictional test for Gillette, can not hide behind the unrealistic assumption that the State would apply the same test to others similarly situated during the contested tax period (1976 to 1981), thereby eliminating unconstitutional discrimination against Gillette under the Equal Protection Clause. In *Iowa Des Moines National Bank* v. *Bennett*, 284 U.S. 239, 247 (1931), Justice Brandeis stated, *inter alia*,

> "The fact that the State may have power to equalize the treatment of the petitioners and the competing domestic corporations by compelling the latter to pay hereafter the unpaid balance of the amounts assessed them . . . is not material. The petitioners' rights were violated, and the causes of action arose, when taxes at the lower rates were collected from their competitors. It may be assumed that all ground for a claim for refund would have fallen if the state, promptly upon discovery of the discrimination, had removed it by collecting the additional taxes from the favored competitors. By such collection the petitioners' grievances would have been redressed; for these are not primarily over assessment. The right invoked is that to equal treatment; and such treatment will be attained if either their competitors' taxes are increased or their own reduced. But it is well settled that a taxpayer who has been subjected to discriminatory taxation through the favoring of others in violation of federal law, cannot be required himself to assume the burden of seeking an increase of the taxes which the others should have paid. *Cumberland Coal Co.* v. *Board of Revision*, [284 U.S. 23]; *Greene* v. *Louisville & Interurban R. Co.*, 244 U.S. 499, 514-518; *Chicago Great Western Ry. Co.* v. *Kendall*, 266 U.S. 94, 98; *Sioux City Bridge Co.* v. *Dakota County*, [260 U.S. 441]. Nor may he be remitted to the necessity of awaiting such action by the state officials upon their

> own initiative. *Montana National Bank* v. *Yellowstone County*, [276 U.S. 499]."[24]

There can be no escape from the conclusion that the Michigan Court of Appeals' decision deprived Gillette of Equal Protection. In so doing, the Court cannot hide behind the shield of judicial power, for such a shield is easily pierced by the arrows of constitutional Fourteenth Amendment rights.

But, Gillette's tale of unconstitutional discrimination is not yet complete. As was called to the attention of the Michigan Supreme Court on motion for reconsideration, the Department subsequently announced that it will require other nontaxpayers similarly situated to apply the new test only retroactively to 1989.[25] The Department, accordingly, has deliberately refused to even attempt to retroactively apply the new test to others similarly situated during the contested tax period, 1976 to 1981. *McKesson*, 496 U.S. at 40. Gillette alone, of the hundreds or thousands of similarly situated potential taxpayers, is being forced by the State to pay taxes on this disadvantageous jurisdictional theory during the contested tax years here at issue.

No legislative policy or justification exists, or could exist, which would justify such arbitrary, systematic and intentional discrimination against Gillette. While it may have been convenient for the Michigan Court of Appeals to ignore the Equal Protection impact of its decision, this Court has

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[24] In *Montana National Bank of Billings* v. *Yellowstone County*, 276 U.S. 499, 505 (1928), this Court said,

> "But it is said that the taxing officers of the county, in view of the latter decision, now have the power to tax the shares of state banks and thus bring about an equality. As to this it is unnecessary to say more than it nowhere appears that these officers, if they possess the power, have undertaken to exercise it or that they have any intention of ever doing so. It will be soon enough to invite consideration of this purely speculative suggestion when, if ever, the taxing officials shall have put it into practical effect."

[25] App. 230.

held the concept of administrative convenience will not suffice as justification. See *Ohio Bell Telephone Co.* v. *Public Utilities Comm. of Ohio*, 301 U.S. 292, 305 (1937).

It certainly cannot be argued that, by submitting itself to the jurisdiction of the Michigan appellate courts, Gillette waived its right to be protected from state discrimination by the Fourteenth Amendment.[26] No conceivable policy as justification can preserve the constitutionality of the discrimination ordered by the Michigan Court of Appeals.

Where there is no justification for such disparate treatment, the state has two options, either to treat the taxpayer equally with other members of its class, albeit under the long-standing jurisdictional approach the State did apply rather than the new approach its appellate court would like to apply, or to make a good faith effort to apply the new assessment approach to all members of the class. In either event similarly situated taxpayers must be dealt with equally.[27]

State legislatures are accorded great latitude in classifying persons for taxation purposes. This Court has been reluctant to intrude in this area where there is any possible acceptable justification for the classification in a tax law. *Allied Stores of Ohio, Inc.* v. *Bowers*, 358 U.S. 522, 526-527 (1959). However, no possible justification here exists. Had

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[26] This Court held in *Frost & Frost Trucking Co.* v. *Railroad Commission*, 271 U.S. 583, 593-594 (1926),

> "It is not necessary to challenge the proposition that, as a general rule, the state, having power to deny a privilege altogether, may grant it upon conditions as it sees fit to impose. But the power of the state in that respect is not unlimited; and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights. If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence."

See also *Deutsche Bank* v. *Humphrey*, 272 U.S. 517 (1926).

[27] *McKesson*, 496 U.S. at 40, n.23, and cases cited therein.

the Michigan Legislature attempted to single Gillette out for such disparate jurisdictional treatment, the statute would be stricken down under the Fourteenth Amendment Equal Protection Clause. *Brown-Forman Co.* v. *Commonwealth of Kentucky*, 217 U.S. 563 (1910); *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

State administrators in the administration of state taxes have been granted similar latitude, with this Court ruling that unconstitutional administrative discrimination will occur only where there has been intentional, systematic and arbitrary discrimination. *Sioux City Bridge Co., supra*; *Sunday Lake Iron, supra*; *Cumberland Coal Co., supra*. Nevertheless, had the executive branch of government, in its administration of the SBT Act, intentionally singled Gillette out for such unfavorable treatment, that action would be struck down under the Equal Protection Clause. *Id.*

This Court has long held that a state court's orders constitute state action to which the Fourteenth Amendment applies. *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U.S. 673, 681 (1930). Unlike the situation before this Court in the *Sioux City Bridge* case,[28] in this case the Michigan Court of Appeals did not violate the Fourteenth Amendment by upholding an unconstitutional discrimination by those administering the SBT Act; here the Michigan Department had for nearly two decades attempted to avoid precisely this result by uniformly applying the same PL 86-272 jurisdictional test to all. Here the Court of Appeals itself created the discrimination. It is clear that the Michigan Court of Appeals cannot accomplish by judicial order what neither the legislative nor

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[28] In *Sioux City Bridge*, this Court reversed the State Court, noting that, "in substance and effect the decision of the Nebraska Supreme Court upholds the violation of the Fourteenth Amendment to the injury of the bridge company. We must, therefore, reverse its judgment." 260 U.S. at 447.

executive branch of government could have done without violating Gillette's Fourteenth Amendment rights.[29]

Gillette stands alone, separated from the class of potential SBT Act taxpayers who believe themselves not subject to the State's jurisdiction. This discrimination did not result from legislative classification; under the SBT Act all potential SBT taxpayers are treated alike. Likewise, nothing distinguishes Gillette from others in its class under the Michigan Constitution or the United States Constitution. Gillette was singled out for disparate treatment by the decision of the Michigan Court of Appeals. No legitimate State interest can be conceived which can support such discrimination. Review by this Court is imperative to protect Gillette's right to equal protection of the law and to uphold the integrity of this Court's Equal Protection jurisprudence.

III.

THE UNFORESEEABLE, *SUA SPONTE*, 17 YEAR RETROACTIVE APPLICATION OF CIVIL TAX LIABILITY AND POTENTIAL CRIMINAL LIABILITY UNDER A TAX JURISDICTIONAL TEST TOTALLY DIFFERENT FROM THAT ENFORCED FOR NEARLY TWO DECADES, CLEARLY AND DIRECTLY VIOLATED GILLETTE'S DUE PROCESS RIGHTS

This case involves a state appellate court which "engaged in 'retroactive lawmaking' by interpreting a [tax] statute in an unforeseeable manner."[30] The uninformed action of the Michigan Court of Appeals presents the evils of retroactive taxation, and none of the virtues of a measured legislative

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[29] *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U.S. 673, 681 (1930).

[30] This Court warned that such retroactive lawmaking was rife with constitutional hazards. *Whalen* v. *United States*, 445 U.S. 684, 707 n.2 (1980).

determination of how the burden of government expense should be allocated among its beneficiaries. Review by this Court is imperative to protect the integrity of this Court's Due Process jurisprudence and the rights of Gillette.

The Michigan Legislature created the SBT Act and charged its administration to the Department, which in turn repeatedly announced to the world that in its administration of the SBT it would rely on PL 86-272 as its jurisdictional standard. The Michigan Legislature for nearly two decades had acquiesced in the administratively adopted and uniformly applied PL 86-272 standard. Gillette and the Department during fifteen years of litigation relied on this long-standing jurisdictional test as the law.

Enter the Michigan Court of Appeals. That court, *sua sponte*, after the close of the proceedings and without briefs or argument on the issue – contrary to the position of both the Department and Gillette, and contrary to the settled administrative policy left undisturbed by the Michigan Legislature – held that the jurisdictional standard of PL 86-272 did not apply. The court totally ignored the fact that this had been, for 17 years, the applied law relied upon by the State and all potential SBT Act taxpayers the world-over. It did not find the State could not apply PL 86-272 as was done, it merely held the State was not required to apply PL 86-272. Then it ordered a different and conflicting test. By all practical measures, the Michigan Court of Appeals "legislated" a new tax with a 17-year retroactive application to one taxpayer alone, Gillette.

A. The Due Process Clause Prohibits The Michigan Judiciary From Accomplishing By Retroactive Application Of An Unforeseeable Judicial Interpretation Of A Statute, A Result Prohibited To The Legislature.

In *Bouie* v. *Columbia*, 378 U.S. 347 (1964), this Court held that the retroactive application of an unforeseeable judicial expansion of a statutory test was barred by the Due

Process Clause of the Fourteenth Amendment. This Court admonished:

> Indeed, an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an *ex post facto* law, such as Art. I, § 10, of the Constitution forbids. . . . If a state legislature is barred by the *Ex Post Facto* Clause from passing such a law, **it must follow that a State Supreme Court is barred by Due Process from achieving precisely the same result by judicial construction.**

Id. at 353-54 (emphasis added). *See Douglas* v. *Buder*, 412 U.S. 430, 432 (1973).

This Court recognized in *Bouie* that the Due Process limitation operates against both penal and civil retroactive judicial lawmaking, even though the *Ex Post Facto* Clause is limited to penal legislation. This Court reasoned that the limitation on retroactive judicial lawmaking is grounded in the same "basic due process concept" applied in *Brinkerhoff-Faris* to invalidate the retroactive application of a judicial reversal of a consistent line of state procedural decisions. 378 U.S. at 354-55. This Court reiterated:

> Applicable in either situation is this Court's statement in *Brinkerhoff-Faris*, *supra*, that "if the result above stated were attained by an exercise of the State's legislative power, the transgression of the due process clause of the Fourteenth Amendment would be obvious," and "The violation is none the less clear when that result is accomplished by the state judiciary in the course of construing an otherwise valid . . . state statute."

Bouie, 378 U.S. at 355 (quoting *Brinkerhoff-Faris*, 281 U.S. at 679-80). *See Ownbey* v. *Morgan*, 256 U.S. 94, 111 (1921).

This Court also recognized in *Bouie*, in the criminal law context, that "an unforeseeable and retroactive judicial expansion of narrow and precise statutory language" presents "a potentially greater deprivation . . . than in the 'void for vagueness' situation." 378 U.S. at 352. This Court reasoned

that if the Fourteenth Amendment will not abide the enforcement of a statute when a person is obliged to guess or speculate as to the statute's scope,[31] then "**the violation is that much greater when, because the uncertainty as to the statute's meaning is itself not revealed until the court's decision, a person is not even afforded an opportunity to engage in such speculation before committing the act in question.**" 378 U.S. at 353 (emphasis added).

Gillette has been subjected to a compelling demonstration of the type of retroactive judicial lawmaking that this Court warned of in *Bouie* and invalidated as contrary to basic Due Process concepts. Here the Michigan Court of Appeals, *sua sponte*, without notice, argument or briefs, mistakenly rejected PL 86-272 as the test to be met by the State in asserting jurisdiction to tax Gillette. The State's adoption of PL 86-272 as the jurisdictional test had been in place for nearly two decades; the Department had repeatedly announced its uniform application; and Gillette had thrice before trial, and from the Deputy Revenue Commissioner himself at trial (App. 248), verified that the State relied exclusively on PL 86-272, which it had uniformly applied to all, as the sole basis for its jurisdiction to tax Gillette under the SBT Act. The new test announced by the Court of Appeals could not reasonably have been anticipated by Gillette.

Gillette believed the State could not establish jurisdiction to deprive it of its property through taxation under the uniformly applied PL 86-272 jurisdictional test. The Court of Appeals, however, *sua sponte* and without understanding or totally disregarding these facts, ordered 17 years retroactively a different test, under which Gillette had no defense. Under this unforeseeable and retroactive judicial change in the SBT jurisdictional basis, Gillette is now asked to pay over a million dollars in taxes plus interest dating back 17 years.

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[31] *See Lanzetta* v. *New Jersey*, 306 U.S. 451, 453 (1939); *Connally* v. *General Const. Co.*, 269 U.S. 385, 391 (1926).

In *Bouie*, this Court concluded specifically that the Due Process Clause forbade the judiciary from engaging in retroactive lawmaking which, if attempted by the legislature, would run afoul of the *Ex Post Facto* Clause, recounting that "An *ex post facto* law has been defined by this Court as one 'that makes an action done before the passing of the law, and which was *innocent* when done, criminal; and punishes such action,' or 'that *aggravates* a *crime*, or makes it *greater* than it was when committed.' " *Bouie*, 378 U.S. at 353 (quoting *Calder* v. *Bull*, 3 U.S. (3 Dall.) 386, 390 (1798)). The uninformed, *sua sponte* action of the Michigan Court of Appeals will operate in precisely that fashion.

In reliance on the long-standing and unquestioned PL 86-272 jurisdictional test established by the Department, Gillette had deliberately refused to file SBT Act returns. Intentionally refusing to file such returns can be prosecuted as a felony.[32] While the State has not charged Gillette criminally, the retroactive lawmaking of the Michigan Court of Appeals would now criminalize conduct that, at the time Gillette refused to file the SBT returns, was in accord with the repeated pronouncements of the responsible executive department. While this appeal involves retroactive taxation and not retroactive criminal liability, this serves to illustrate the fundamental and basic unfairness, and the consequent unconstitutionality of the Court's retroactive order.

The jurisprudence of this Court, and *Bouie* in particular, clearly establish that the Due Process Clause of the Fourteenth Amendment does not permit "an unforeseeable and retroactive judicial expansion of narrow and precise statutory language." 378 U.S. at 352. Whether by retroactively subjecting Gillette to taxation under a standard of which there was "not only no fair warning, but no warning whatever," *id.* at

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[32] Under Section 27 of Michigan's Department of Revenue Act, MCL 205.27, MSA 7.657(27), a person who fails or refuses to make a return within the time specified with the intent to evade payment of a tax, has committed a felony punishable by a fine of not more than $5,000 or imprisonment for not more than five years, or both.

355, or by retroactively criminalizing conduct that was innocent at the time, *id.* at 353, the *sua sponte* action of the Michigan Court of Appeals is a clear and direct violation of the rights secured to Gillette by the Due Process Clause of the Fourteenth Amendment.

To retroactively change the jurisdictional basis for a tax and ask a taxpayer to remit taxes with respect to activities undertaken 17 years earlier, whether the taxpayer would have acted differently then or not, deprives the taxpayer of the reasonable reliance that, with respect to those long past and probably forgotten activities, its State tax obligations have long been met. No legislature would be permitted to amend an existing tax statute retroactively with the result that taxpayers believing themselves not liable for the tax in connection with activities undertaken 17 years ago, would now be liable for tax, plus interest. At some point the State's need to raise revenues from those within its jurisdiction must be balanced against the need for its subjects to rest assured that they have met their State tax obligations for years long past and were correct in committing whatever resources remained to other purposes. An unforeseeable 12 year retroactive tax would clearly deprive a person of property without due process of law. Review in this Court is necessary to assure that what a legislature is prohibited from enacting by the Due Process Clause cannot, nevertheless, be accomplished by the retroactive order of the Michigan Court of Appeals.

B. The New Tax Burden Proclaimed By The Michigan Court Of Appeals And Retroactively Applied Back To 1976 Attempts To Reach Events So Far In The Past That It Exceeds the Limits Imposed by the Due Process Clause

This Court observed, in *Welch* v. *Henry*, 305 U.S. 134, 148 (1938), that **"a tax may attempt to reach events so far in the past"** as to exceed the limits of the Due Process Clause of the Fourteenth Amendment. (emphasis added). To apply the Due Process limitation on retroactive taxation **"it is necessary to consider the nature of the tax and the circumstances in which it is laid before it can be said that its**

retroactive application is so harsh and oppressive as to transgress the constitutional limitation." *Id.* at 147 (emphasis added).

In *Welch*, this Court approved the retroactive application of a Wisconsin income tax to dividends received after the beginning of the proceeding legislative session. This Court stated, "the legislature in 1935, at the first opportunity after the tax year in which the income was received, made its revision of the tax laws applicable to 1933 income." *Id.* at 151. The retroactive application had a rational objective, it was based upon information for the first time available to the Wisconsin legislature from the prior year.

More recently in *United States* v. *Darusmont*, 449 U.S. 292, 496 (1981), this Court recognized that Congress almost routinely gives tax statutes an effective date prior to the date of enactment. It held application of an income tax statute to the entire calendar year in which enactment took place does not *per se* violate Fifth Amendment Due Process, citing numerous precedents including *Welch*. It recognized that retroactive application to the entire calendar year preceding enactment may be permissible. Under none of these precedents, and in no other precedent located, has the enactment of a new or changed tax law reaching back 17 years to impose an unanticipated new state or federal tax for that year, been upheld.[33]

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[33] In *Darusmont*, this Court relied upon *Cooper* v. *United States*, 280 U.S. 409, 411 (1930), where the Court stated that:

> "the questioned provision could not be declared in conflict with the Federal Constitution merely because it requires gains from *prior but recent transactions* to be treated as part of the taxpayer's gross income has not been opened to serious doubt since *Brushaber* v. *Union Pacific R Co*, 240 U.S. 1, and *Lynch* v. *Hornby*, 247 U.S. 339". (emphasis added).

Gillette stands in sharp contrast to the position of the *Welch* plaintiffs. Gillette is not confronted with a legislative determination that "recent transactions" should be used to apportion "the cost of government among those in some measure are privileged to enjoy its benefits and must bear its burdens." 305 U.S. at 146. The Michigan Legislature and the responsible executive department had long since established that the costs of government were fairly apportioned by taxing those companies that satisfied the PL 86-272 jurisdictional standard.[34] The Michigan Court of Appeals, however, unilaterally revised that apportionment and reached back 17 years to apply another. This retroactivity cannot be justified as a rational measure to spread the cost of government over those who benefitted, because this retroactivity was no part of such a rational plan, but was ordered with respect to a single taxpayer by a Court acting on a mistake of fact.

Recently, in *McKesson Corp.* v. *Division of Alcoholic Beverages and Tobacco,* 496 U.S. 18 (1990), this Court again warned that "**beyond some temporal point**" the retroactive imposition of a significant tax burden may be "so harsh and oppressive as to transgress the constitutional limitation,"

This Court also cited *United States* v. *Hudson*, 299 U.S. 498, 500 (1937):

> In respect to income tax statutes it long has been the practice of Congress to make them retroactive *for relatively short periods of time* so as to include profits from transactions consummated while the statute was in process of enactment, or within so much of the calendar year as preceded the enactment; and repeated decision of this Court have recognized this practice and sanctioned it as consistent with the due process clause of the Constitution. (emphasis added)

[34] In *Welch* v. *Henry*, this Court stated,

> " . . . experience has shown the importance of reasonable opportunity for the legislative body, in the revision of tax laws, to distribute increased costs of government among its taxpayers in the light of present need for revenue and with knowledge of the sources and amounts of the various classes of taxable income during the taxable period preceding revision."

305 U.S. at 149.

depending on "the nature of the tax and the circumstances in which is it laid." *Id.* at 40 n.23 (quoting *Welch*, 305 U.S. at 147) (emphasis added). *See also United States* v. *Hemme*, 476 U.S. 558, 569 (1986). ("One of the relevant circumstances is whether, without notice, a statute gives a different and more oppressive legal effect to conduct undertaken before enactment of the statute.")[35]

"The nature of the tax and the circumstances in which it [was] laid" against Gillette – by the unforeseeable and retroactive decision of the Michigan Court of Appeals, acting *sua sponte* to cast aside the established law and impose broader-based tax liability than that uniformly applied for 17 years – is surely "so harsh and oppressive as to transgress the constitutional limitation." *Welch*, 308 U.S. at 147. Further, the retroactive application for 17 years is surely "beyond [the] temporal point" tolerable under the Due Process Clause. *McKesson*, 496 U.S. at 40 n.23. Review by this Court is imperative, lest this Court's repeated warnings of the Due Process limits upon retroactive taxation be obviated by the extraordinary actions of the Michigan Court of Appeals.

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[35] While in *Hemme*, this Court found that taxpayer had not suffered different and oppressive treatment as a result of the Act (476 U.S. 571), in the *Gillette* circumstances the result was dramatically different. It was "different" for Gillette alone to be retroactively deprived of its defense on the merits of its appeal that it was not subject to tax under the PL 86-272 jurisdictional test. It was "oppressive", as Gillette was the only taxpayer subjected to the new, less favorable test.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari to the Michigan Court of Appeals should be granted.

Respectfully submitted,

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October 27, 1994

APPENDIX A

STATE OF MICHIGAN COURT OF APPEALS

198 Mich App 303, 497 NW2d 595 (1993)

THE GILLETTE COMPANY v
DEPARTMENT OF TREASURY

Docket No. 118660. Submitted May 7, 1992, at Lansing. Decided March 1, 1993, at 9:00 A.M. Leave to appeal sought.

The Gillette Company, a Delaware corporation whose base of operations as a manufacturer is in Massachusetts, petitioned the Michigan Tax Tribunal for review of single business tax assessments levied by the Department of Treasury for the years 1976 through 1981. During that period, the petitioner maintained a sales staff of at least eighteen full-time representatives in Michigan who took orders from retailers, submitted them to the petitioner's main office, reviewed retailers' product displays, informed retailers of promotions offered by the petitioner, and replaced defective merchandise. The tribunal affirmed the assessments. The petitioner appealed.

The Court of Appeals *held*:

1. The single business tax is a value added tax, not an income tax, and therefore is not precluded by 15 USC 381, which bars state taxes imposed on, or measured by, net income derived from interstate commerce if the only business activity within the state consists of the solicitation of orders that are sent outside the state for approval.

2. The imposition of single business taxes on the petitioner does not violate the Due Process Clause, US Const, Am XIV. The petitioner purposefully directed its activities at Michigan residents, the magnitude of its contacts was more than sufficient for due process purposes, and the tax is related to the benefits the petitioner received from access to Michigan.

3. The imposition of single business taxes on the petitioner does not violate the Commerce Clause, US Const, art I, § 8, cl 3. The tax is applied to an activity with a substantial nexus with Michigan, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by Michigan.

4. The Tax Tribunal did not err in determining that, under the circumstances of this case, the petitioner was engaged in business activity in Michigan, as defined by MCL 208.3(2); MSA 7.558(3)(2), so as to be liable for single business taxes.

5. In the absence of clear and cogent evidence that the apportionment formula used by the respondent disproportionately attributed business activity in Michigan or led to a grossly distorted result, the petitioner is not entitled to a revision of the formula pursuant to MCL 208.69; MSA 7.558(69).

6. The respondent's failure to provide supporting reasons and authority for its assessments in its decision and order of determination of taxes due following an informal hearing does not render the assessments void or mandate a reversal of the decision of the Tax Tribunal in

view of the review de novo conducted by the tribunal.

7. The Tax Tribunal's failure to explicitly state that the respondent bore the burden of proving jurisdiction to impose single business taxes on the petitioner does not constitute error. The tribunal and the parties were aware of the burden of proof, and the tribunal did not shift any part of that burden to the petitioner.

8. The Tax Tribunal did not abuse its discretion in denying the petitioner's discovery motions.

Affirmed.

Miller, Canfield, Paddock & Stone (by *Samuel J. McKim, III, Robert F. Rhoades,* and *Joanne B. Faycurry*), for the petitioner.

Frank J. Kelley, Attorney General, *Thomas L. Casey,* Solicitor General, and *Russell E. Prins* and *Terry P. Gomoll,* Assistant Attorneys General, for the respondent.

Before: WAHLS, P.J., and MARILYN KELLY and REILLY, JJ.

REILLY, J. Petitioner appeals as of right from an opinion and judgment of the Michigan Tax Tribunal affirming tax assessments against petitioner for the years 1976 through 1981 pursuant to the Single Business Tax Act, MCL 208.1 *et seq.;* MSA 7.558(1) *et seq.* We affirm.

Petitioner, a Delaware corporation, with its base of operations in Boston, Massachusetts, is a manufacturer and wholesaler of personal care products, razors and ballpoint pens. During the period in question, petitioner

maintained a sales staff that called on customers in Michigan. The sales representatives took orders from customers and submitted them to the main office, review customers' displays and shelving arrangements of Gillette merchandise, informed customer of promotions offered by petitioner and replaced defective merchandise.

Petitioner filed three separate petitions with the Michigan Tax Tribunal contesting respondent's single business tax assessments against petitioner for the years 1976 through 1981. Petitioner challenged, on the basis of 15 USC 381 and MCL 208.3(2); MSA 7.558(3)(2), respondent's jurisdiction to make the assessments. Additionally, petitioner challenged the apportionment of its Michigan business activities and asserted procedural errors on the part of respondent. After a lengthy hearing, the tribunal rejected all of petitioner's arguments and affirmed the taxes and interest assessed by respondent.

Our review of Tax Tribunal decisions, in the absence of fraud, is limited to whether the tribunal made an error of law or adopted a wrong legal principle. *Dow Chemical Co v. Dep't of Treasury*, 185 Mich App 458, 462-463; 462 NW2d 765 (1990). We accept the factual findings of the tribunal as final, provided they are supported by competent, material and substantial evidence on the whole record. Const 1963, art 6, § 28; *Id.*

I

APPLICATION OF 15 USC 381 (PL 86-272)

Petitioner argues, as it did before the tribunal, that respondent is prohibited from assessing single business

taxes on petitioner for mere solicitation of orders in Michigan by 15 USC 381 (PL 86-272) which provides, in pertinent part:

> (a) No State . . . shall have power to impose . . . a *net income tax* on the income derived within such State by any person from interstate commerce if the only business activities within such State by or on behalf of such person during such taxable year are either, or both, of the following:
>
> (1) the solicitation of orders by such person, or his representative, in such State for sales of tangible personal property, which orders are sent outside the State for approval or rejection, and, if approved, are filled by shipment or delivery from a point outside the State; and
>
> (2) the solicitation of orders by such person, or his representative, in such State in the name of or for the benefit of a prospective customer of such person, if orders by such customer to such person to enable such customer to fill orders resulting from such solicitation are orders described in paragraph (1). [Emphasis added.]

The term "net income tax" is defined as "any tax imposed on, or measured by, net income." 15 USC 383.

Although not raised as an issue by the parties, we must determine whether PL 86-272 applies in the instant case.[1] Respondent asserts in its brief on appeal that the

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[1] This issue apparently has not been resolved by an appellate court of this state. In *Amway Corp v Dep't of Treasury*, 433 Mich 908; 448 NW2d 348 (1989) the Supreme Court vacated, in

single business tax is not an income tax. However, respondent acknowledges that it used PL 86-272 as a guide for determining whether there was a sufficient nexus between the activities of petitioner and the State of Michigan to permit the assessment of the single business tax.[2]

The single business tax is a consumption-type value added tax. *Caterpillar, Inc. v Dep't of Treasury*, 440 Mich 400, 408; 488 NW2d 182 (1992). "Value added is defined as the increase in the value of goods and services brought about by whatever a business does to them between the time of purchase and the time of sale." Haughey, *The economic logic of the single business tax*, 22 Wayne L R 1017, 1018 (1976). The value-added tax is imposed upon the value added by the production of the final goods. *Mobil Oil Corp v Dep't of Treasury*, 422 Mich 473, 493; 373 NW2d 730 (1985).

> A VAT [value added tax] differs in important respects from a corporate income tax. A corporate income tax is based on the philosophy of ability to pay, as it consists of some portion of the profit remaining after a company has provided for its workers, suppliers, and other creditors. A VAT, on the other hand, is a much

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part, the decision of this Court is 176 Mich App 285; 438 NW2d 904 (1989) and ordered this Court entertain supplemental briefing on whether PL 86-272 had any application to that case which involved the imposition of the single business tax. However, the issue was never addressed by this Court because the case was dismissed by stipulation of the parties. See Docket No. 124202.

[2] Although petitioner argues the contrary, the tribunal did consider whether the activities of petitioner for all of the years in question exceeded "mere solicitation".

> broader measure of a firm's total business activity. Even if a business entity is unprofitable, under normal circumstances it adds value to its products and, as a consequence, will owe some VAT. Because value added is a measure of actual business activity, a VAT correlates more closely to the volume of governmental services received by the taxpayer than does an income tax. Further, because value added does not fluctuate as widely as net income, a VAT provides a more stable source of revenue than the corporate income tax. [*Trinova Corp v Michigan Dep't of Treasury*, 498 US 358; 111 S Ct 818, 824; 112 L Ed 2d 884 (1991).]

Section 31 of the Single Business Tax Act provides that the tax levied and imposed under the act is imposed upon "the privilege of doing business and not upon income." MCL 208.31(3); MSA 7.558(31)(3). The appellate courts of this state have rejected the theory that the single business tax is a tax upon income. *Trinova Corp v Dep't of Treasury*, 433 Mich 141, 149; 445 NW2d 428 (1989) aff'd 498 US 358; 111 S Ct 818; 112 L Ed 2d 884 (1991); *Mobil Oil, supra* at 493-495; *Town & Country Dodge, Inc v Dep't of Treasury*, 152 Mich App 748, 755; 394 NW2d 472 (1986); *Wismer & Becker Contracting Engineers v Dep't of Treasury*, 146 Mich App 690, 696; 382 NW2d 505 (1985).[3] We conclude, therefore, that the single business tax is not a tax "imposed on" net income.

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[3] But see, *Armco Steel Corp v Dep't of Revenue*, 359 Mich 430; 102 NW2d 552 (1960) which analogized the now repealed Michigan business activities tax, MCL 205.551-205.563; MSA 7.557(1)-7.557(24), repealed by 1967 PA 281, which was also a type of value added tax, to a net income tax.

Next, we consider whether the single business tax is a tax "measured by" net income. The computation of the single business tax begins with the calculation of the taxpayer's tax base. "Tax base" is defined as business income (or loss) before apportionment subject to certain adjustments. MCL 208.9; MSA 7.558(9); *Trinova, supra* 433 Mich 150. "Business income" is essentially federal taxable income. MCL 208.3(3); MSA 7.558(3)(3). Adjustments to business income include additions to reflect business consumption of labor and capital. Additions to business income include adding back compensation, depreciation, dividends, and interest *paid* by the taxpayer to the extent deducted from federal taxable income. Common deductions from business income include dividends, interest, and royalties *received* by the taxpayer to the extent included in federal taxable income. This income is deducted for the purpose of value added computation because it does not result from capital expenditure by the taxpayer. MCL 208.9; MSA 7.558(9); *Trinova, supra,* 433 Mich 150-151.[4] Once the tax base is calculated, the portion of the value added that is attributable to Michigan must be determined. MCL 208.45; MSA 7.558(45).[5] After the tax

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[4] See Kasischke, *Computation of the Michigan single business tax: Theory and mechanics,* 22 Wayne L R 1069 (1976), for a complete discussion regarding the calculation of the tax base.

[5] MCL 208.45; MSA 7.558(45) provides the formula for apportioning a taxpayer's tax base between two or more taxing states. The three factor formula used to apportion the value added for the tax years applicable in this case was determined as follows:

1. $\frac{\text{average value of taxpayer's Michigan property}}{\text{average value of taxpayer's total property}} = X$
2. $\frac{\text{total wages paid in Michigan}}{\text{total wages paid by the taxpayer}} = Y$

base has been apportioned and subjected to certain adjustments, it is multiplied by 2.35 percent to determine the taxpayer's tax liability. MCL 208.31(1); MSA 7.558(31)(1).

It is clear from the theory underlying the single business tax and the methods used to calculate the tax base and the apportionment formula, that the single business tax is not a tax "measured by net income." Although business income or federal taxable income is a starting point for and a component of the tax base, because of the extensive adjustments required to compute the single business tax, we cannot say that the tax is "measured by" net income.[6] Accordingly, we conclude that the restriction imposed by PL 86-272 does not apply to taxes imposed under the Single Business Tax Act.[7]

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3. $\frac{\text{sales within Michigan}}{\text{total sales}} = Z$
4. $\frac{X + Y + Z}{3}$ = apportionment percentage.

[6] See also Opper, *Constitutional aspects of the Single Business Tax Act*, 22 Wayne L R 1167, 1168-1171 (1976).

[7] We need not determine whether petitioner's activity in Michigan exceeded "mere solicitation" under the standard of *Wisconsin Dep't of Revenue v Wrigley Co*, 505 US ___; 112 S Ct 2447; 120 L Ed 2d 174 (1992) because that case addressed only the prohibition against taxation of net income derived from "mere solicitation" under PL 86-272.
We are aware that the single business tax replaced several different business taxes, including the corporate income tax. *Trinova, supra* 111 S Ct 825. We also recognize that Michigan was the first and may be the only state to impose a value added type tax on business activity. *Id.* It seems likely that Congress, when enacting PL 86-272 to preclude the imposition of a net income tax upon foreign corporations whose activities in the taxing

II

Because PL 86-272 does not apply in this case, we must determine whether the imposition of the single business tax on petitioner is permissible under the Due Process and Commerce Clauses, US Const, Am XIV and art I, § 8, cl 3. Although the trial court did not resolve these issues, our review is nevertheless proper because these issues involve the determination of a question of law and the facts necessary for their resolution have been presented. *Spruytte v Owens*, 190 Mich App 127, 132; 475 NW2d 382 (1991).

A. DUE PROCESS ANALYSIS

In order to meet the requirements of the Due Process Clause there must be "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax." *Quill Corp v North Dakota*, 504 US ___; 112 S Ct 1904, 1909; 119 L Ed 2d 91, 102 (1992), quoting *Miller Bros Co v Maryland*, 347 US 340, 344-345; 74 S Ct 535; 98 L Ed 744 (1954). Additionally, the income attributed for tax purposes must be rationally related to "values connected with the taxing State." *Id.* quoting *Moorman Mfg Co v Bair*, 437 US 267, 273; 98 S Ct 2340; 57 L Ed 2d 197 (1978).

In *Quill*, the petitioner challenged the authority of the state of North Dakota to compel it to collect a use tax

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state were limited to mere solicitation, did not contemplate the creation or imposition of a value added tax. Nevertheless, we are bound by the plain words of the statute which addresses only taxes "imposed on, or measured by, net income."

from its North Dakota customers. The petitioner in *Quill* sold office supplies and equipment through catalogs, advertisements in national periodicals and telephone calls. It did not have sales personnel or any employees located in North Dakota nor did it own any significant amount of property in the state. Nevertheless, the Supreme Court found that there was a sufficient connection between the petitioner and North Dakota to satisfy due process requirements:

> In this case, there is no question that Quill has purposefully directed its activities at North Dakota residents, that the magnitude of those contacts are more than sufficient for due process purposes, and that the use tax is related to the benefits Quill receives from access to the State. We therefore agree with the North Dakota Supreme Court's conclusion that the Due Process Clause does not bar enforcement of that State's use tax against Quill. [*Quill, supra,* 112 S Ct at 1911.]

Similarly, we conclude that the Due Process Clause does not bar the assessment of the single business tax on petitioner for the years 1976-1981. During that time, petitioner employed at least eighteen full-time sales representatives in the state of Michigan for the purpose of soliciting orders from customers in Michigan. As in *Quill,* petitioner purposefully directed its activities at Michigan residents and the magnitude of its contacts is "more than sufficient for due processes." Furthermore, the single business tax is related to the benefits petitioner receives from access to Michigan.

B. COMMERCE CLAUSE ANALYSIS

As the Supreme Court explained in *Quill*, the nexus standards of the Due Process and Commerce Clauses are not identical. A tax that withstands a due process challenge will not necessarily withstand a commerce clause challenge. *Quill, supra*, 112 S Ct at 1913. A tax will sustain a Commerce Clause challenge when it: (1) is applied to an activity with a substantial nexus with the taxing state, (2) is fairly apportioned, (3) does not discriminate against interstate commerce, and (4) is fairly related to the services provided by the state. *Complete Auto Transit, Inc v Brady*, 430 US 274, 279; 97 S Ct 1076; 51 L Ed 2d 326 (1977); *Caterpillar, supra* 415. Although it does not directly address the issue of the Commerce Clause, the focus of petitioner's argument below and of the tribunal's findings was on the nexus between petitioner's activities and the State of Michigan.

In *Quill* the Court was concerned with whether a taxpayer must have a physical presence in the taxing state before a substantial nexus could be established. In reaffirming the physical presence requirement of *Natl Bellas Hess, Inc v Illinois Dep't of Revenue*, 386 US 753; 87 S Ct 1389; 18 L Ed 2d 505 (1967) the Court noted that the presence in a state of a small sales force, plant or office may be sufficient to establish a substantial nexus for Commerce Clause purposes. *Quill, supra*, 112 S Ct 1914-1915, citing *Natl Geographic Society v California Bd of Equalization*, 430 US 551; 97 S Ct 1386; 51 L Ed 2d 631 (1977); *Scripto, Inc v. Carson*, 362 US 207; 80 S Ct 619; 4 L Ed 2d 660 (1960).

In the present case, not only did petitioner have a sales staff of at least eighteen full-time sales representatives located in Michigan, it had an ownership interest in promotional and replacement merchandise located in Michigan, leased automobiles for its sales representatives in Michigan and had substantial sales in Michigan generated by the sales staff. Accordingly, we conclude that the single business tax imposed in this case was applied to an activity having a substantial nexus to this state. *Scripto, supra; Caterpillar, supra,* 417.

III

TAXATION ON "BUSINESS ACTIVITY"

Next, petitioner argues that the Tax Tribunal's decision was erroneous because petitioner is not engaged in "business activity" within the State of Michigan and therefore, cannot be subject to the single business tax. We disagree.

MCL 208.31(1); MSA 7.558(31)(1) provides that a tax of 2.35 percent will be imposed upon every person with business activity in Michigan. "Business activity" is defined as

> A transfer of legal or equitable title to or rental of property, whether real, personal, or mixed, tangible or intangible, or the performance of services, or a combination thereof, made or engaged in, or caused to be made or engaged in, within this state, whether in intrastate, interstate, or foreign commerce, with the object of gain, benefit, or advantage, whether direct or indirect, to the taxpayer or to others, but shall not include the services rendered by an

> employee to his employer, services as a director of a corporation, or a casual transaction. Although an activity of a taxpayer may be incidental to another or other of his business activities, each activity shall be considered to be business engaged in within the meaning of this act. [MCL 208.3(2); MSA 7.558(3)(2).]

During the period in question, petitioner engaged in business activity in Michigan through its sales representatives who personally approached Michigan businesses and solicited orders for petitioner's products, provided expertise and advice to those businesses regarding the sale of petitioner's products to their customers, and acted as liaison between those businesses and petitioner. These are essentially the same activities performed by the taxpayer in *Trinova, supra,* 433 Mich at 141 where the Court, noting the definition of business activity provided in MCL 208.3; MSA 7.558(3), found that Trinova's sales to Michigan customers were a "business activity." See 433 Mich 164, n 25.

Petitioner argues that the transfer of legal title to the property sold did not occur in this state. However, we note that petitioner's sales representatives, while soliciting orders, were also engaged in performing services for its customers "with the object of gain, benefit, or advantage, whether direct or indirect."

IV

APPORTIONMENT OF PETITIONER'S BUSINESS ACTIVITY TO MICHIGAN

Petitioner also asserts that if it is to be subjected to the Single Business Tax, the apportionment formula used

pursuant to MCL 208.45; MSA 7.558(45) should be revised because it does not fairly represent the extent of the petitioner's business activity in the state, MCL 208.69; MSA 7.558(69). The same argument was made by the taxpayer in *Trinova, supra.* In that case, the Court first noted that apportionment relief under MCL 208.69; MSA 7.558(69), was only available if the apportionment provisions "do not fairly represent the extent of the taxpayer's business activity in this state." 433 Mich 155. Apportionment relief pursuant to § 69, is available upon a showing of "clear and cogent evidence that the total business activity attributed to the state is out of all appropriate proportion to the taxpayer's intrastate business activity or has led to a grossly distorted result." *Id.*, 167.

In *Trinova* the taxpayer argued that its apportioned compensation was greater that [sic] is actual Michigan compensation and its apportioned depreciation was greater than its actual Michigan depreciation. The Court rejected the notion that a taxpayer's business activity is not fairly apportioned because a single component of that activity is not accurately reflected under the apportionment scheme. The Court found that to properly judge the propriety of the apportioned business activity, the activity as a whole must be examined. *Id.*, 161-163.

In this case, petitioner asserts that its business activity in Michigan is overstated because the apportionment formula improperly identifies sales to Michigan businesses in calculating the Michigan portion of the sales factor of the formula. Petitioner asserts that these sales should not be attributable to Michigan because they are made in Boston, Massachusetts. See MCL 208.52; MSA 7.558(52). However, petitioner has not presented clear

and cogent evidence that its total business activity attributed to Michigan is out of all proportion to petitioner's intrastate business or that the apportionment formula has led to a grossly distorted result. Accordingly, we conclude that petitioner is not entitled to relief under MCL 208.69; MSA 7.558(69).

V

DE NOVO REVIEW BY TAX TRIBUNAL

Petitioner next asserts that the original tax assessments were void because the respondent failed to provide supporting reasons and authority for its assessments in its decision and order of determination of taxes due in accordance with MCL 208.87; MSA 7.558(87).[8] However, petitioner has not cited and our research has not revealed any authority for the proposition that the failure of the respondent, when issuing its decisions after the informal hearings held on assessments, to provide reasons and authority for its decisions renders the assessments void or mandates reversal of the decision of the Tax Tribunal.

In this case, after the informal hearing and the decision by the respondent upholding the assessments, petitioner appealed to the Tax Tribunal. The proceeding before the tribunal was "original and independent and shall be considered de novo." MCL 205.735(1); MSA 7.650(35). The tribunal conducted a lengthy hearing and

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[8] The administration, collection and enforcement provisions of the Single Business Tax Act, including §87, have been repealed and replaced by the provisions in MCL 205.1-205.30; MSA 7.657(1)-7.657(30). See MCL 208.80; MSA 7.558(87).

issued a thorough opinion. Accordingly, any irregularity in the original decision by the department does not require us to reverse the decision of the tribunal.

VI

BURDEN OF PROOF

Petitioner also argues that the tribunal erred in not ruling that respondent had the burden of proof. As petitioner notes, the burden is always on the state to establish the necessary facts to sustain a claim for taxes. *Auer v Dep't of Treasury,* 137 Mich App 353, 358; 357 NW2d 696 (1984) citing *Consumers Power Co v Corporation & Securities Comm,* 326 Mich 643; 40 NW2d 756 (1950). Although the tribunal did not explicitly state that the burden of establishing the jurisdiction to tax was on respondent, it appears from the record that this was understood by the parties and the tribunal, and that respondent presented the necessary facts to establish jurisdiction. There is no indication that the burden was improperly allocated, or that the tribunal assigned any burden to petitioner with regard to the respondent's responsibility to establish jurisdiction to tax. Therefore, there was no error in the apparent failure to explicitly state the burden of proof. See *Zenith Industrial Corp v Treasury Dep't,* 130 Mich App 464, 468-469; 343 NW2d 495 (1983).

VII

DISCOVERY

Lastly, petitioner argues that the tribunal erroneously denied its discovery motions. Discovery procedures do

not apply in nonproperty tax appeals unless ordered by the tribunal. *Lawrence v Dep't of Treasury*, 128 Mich App 741, 744; 341 NW2d 200 (1983). The tribunal in this case apparently ordered discovery, but denied petitioner's discovery-related motions. Extensive discovery was conducted in this case. Respondent answered two sets of interrogatories submitted by petitioner. Accordingly, we conclude that the tribunal did not abuse its discretion in denying petitioner's motions.

Affirmed.

APPENDIX B

STATE OF MICHIGAN
IN THE COURT OF APPEALS

THE GILLETTE COMPANY, Petitioner-Appellant, v MICHIGAN DEPARTMENT OF TREASURY, Respondent-Appellee. _____/	Court of Appeals No. 118660 MTT Docket Nos. 73916 90676, 90677

APPELLANT'S MOTION FOR REHEARING

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APPELLANT'S MOTION FOR REHEARING

NOW COMES petitioner-Appellant, The Gillette Company ("Gillette"), by and through its legal counsel Miller, Canfield, Paddock and Stone, and in support of its Motion for Rehearing under MCR 7.215(H), respectfully represents unto this Honorable Court of Appeals the following:

1. The Opinion of this Honorable Court of Appeals, a copy of which is attached hereto as *Exhibit A*, was issued in this matter on March 1, 1993 (the "Opinion").

2. The parties to this appeal had briefed the issue as to whether the Michigan Department of Treasury ("Department") had properly applied 15 USC 381 ("PL 86-272") in determining whether the Department could assert jurisdiction to subject Gillette to taxation under the Single Business Tax Act (MCL 208.1, *et seq;* MSA 7.558(1) *et seq*) (the "SBT"). (See Affidavit of Samuel J. McKim III, attached hereto as *Exhibit B.*)

3. The parties briefed and argued the applicability of PL 86-272 as the test for determining state jurisdiction to impose a SBT tax on Gillette back to the year 1976, because the Department had by its Single Business Tax Bulletin 1980-1 – "Jurisdictional Standard" administratively adopted PL 86-272 as the jurisdictional test the Department would uniformly apply to all potential taxpayers. (See Affidavit, *Exhibit B*)

4. The Department has repeatedly admitted in the record on appeal that it did attempt to apply PL 86-272 uniformly to all potential SBT taxpayers from and after 1980, and that it had attempted to apply the same PL 86-272 test to Gillette as it had applied to all others similarly situated. (See Affidavit, *Exhibit B*)

5. This Honorable Court of Appeals misunderstood the basis for the parties reliance upon PL 86-272 as the SBT jurisdictional test, and formed the incorrect conclusion that Michigan courts had not yet determined whether the SBT was an income tax generally subject to PL 86-272. In both respects this Honorable Court of Appeals was incorrect.

6. This Court of Appeals had in 1977 determined that the SBT was not an income type tax literally subject

to PL 86-272 in 1977, a position the Department published in its Single Business Tax Bulletin 1980-1 – "Jurisdictional Standard", and has reiterated since then.

7. This Honorable Court of Appeals Opinion correctly concluded that PL 86-272, by its terms, did not literally apply to the SBT; but ignored the fact that PL 86-272 had been intentionally and uniformly applied since 1980 by the Department as an administrative test to determine jurisdiction under PL 86-272. By rejecting the Department's longstanding administrative test, this Court imposed a test retroactively to 1976 as to Gillette, which is different and less favorable than the PL 86-272 test admittedly imposed by the Department on all other similarly situated potential SBT taxpayers.

8. This Honorable Court of Appeals Opinion, by discriminating against Gillette as opposed to all other similarly situated potential SBT taxpayers since at least 1980, violated the Equal Protection Clause of both the Federal and Michigan Constitutions, and the Uniformity Clause of the Michigan Constitution.

9. This Honorable Court of Appeals Opinion, by retroactively retracting a valid and longstanding Departmental administrative jurisdictional test, uniformly applied since at least 1980 and relied upon by all potential SBT taxpayers, clearly violated strong public policy.

10. This Honorable Court of Appeals' Opinion by retroactively imposing, over 15 years back, a different and much less favorable jurisdictional test on Gillette than was admittedly applied by the Department to all other similarly situated potential taxpayers was grossly

unfair, not to mention unconstitutional and against public policy.

11. This Honorable Court of Appeals' Opinion retracting the longstanding published administrative position of the Department uniformly applied to all taxpayers for many years, should have operated prospectively only, thereby applying the same SBT jurisdictional test to Gillette as was applied by the Department to all other similarly situated potential taxpayers since 1980.

12. This Honorable Court of Appeals should rehear and reconsider its Opinion in this matter, and determine, as was briefed by both parties before the Tax Tribunal and before this Honorable Court of Appeals, whether Gillette is subject to Michigan's SBT jurisdiction under the PL 86-272 test, uniformly and consistently applied by the Department since at least 1980.

13. For the reasons and reasoning more fully set forth in Gillette's Brief in Support of Motion for Rehearing, incorporated herein and attached hereto, this Honorable Court of Appeals should not let stand its unconstitutional Opinion.

WHEREFORE, Petitioner-Appellant, the Gillette Company, respectfully requests that this Honorable Court of Appeals rehear and reconsider its Opinion; recognize the Department's longstanding uniformly applied application of PL 86-272 as the SBT jurisdictional test; and based on the arguments and briefs of the parties determine whether the Department had borne its burden of proving that, under the PL 86-272 test administratively

uniformly applied by the Department, Gillette was subject to Michigan's SBT jurisdiction.

Respectfully submitted,

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DATED: March 22, 1993

STATE OF MICHIGAN

IN THE COURT OF APPEALS

THE GILLETTE COMPANY,

Petitioner-Appellant,

v

MICHIGAN DEPARTMENT OF TREASURY,

Respondent-Appellee.

_____/

Court of Appeals No. 118660

MTT Docket Nos. 73916, 90676, 90677

APPELLANT'S BRIEF IN SUPPORT OF MOTION FOR REHEARING

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I. THE BASES FOR THE REQUESTED REHEARING

This Honorable Court of Appeals Opinion issued in this case on March 1, 1993 (the "Opinion"), must be reconsidered for *each* of the following reasons, which are discussed in more detail in this Brief:

1. The Opinion (decided on an issue not raised by the parties or the Tax Tribunal) is unconstitutional, violating both the Equal Protection Clauses of the Michigan and United States Constitutions (US Const, Am XIV; Const 1963, art 1, § 2 and the Michigan Constitution's Uniformity of Taxation Clause (Const 1963, art 9, § 3)) and must therefore be reconsidered.

2. The Opinion ignores the fact that for nearly 13 years potential taxpayers have relied upon the Department of Treasury's administrative adoption, and uniform application since then, of 15 USC 381 ("PL 86-272") as the Single Business Tax ("SBT") (MCL 208.1 *et seq;* MSA 7.558(1)) jurisdictional test. Constitutional issues aside, the judicially ordered retraction of a longstanding administrative published position upon which many persons have relied should be prospective only, and not retroactive for over 15 years.

3. The Opinion misunderstood and misstated the argument of Petitioner-Appellant, the Gillette Company ("Gillette"), assuming Gillette thought PL 86-272 applicable by its terms, rather than applicable because it had been administratively adopted as a longstanding jurisdictional test uniformly applied by Respondent-Appellee, the Michigan Department of Treasury (the "Department") to all similarly situated taxpayers. Gillette is entitled to have the same jurisdictional test applied to it, as was applied to all other potential taxpayers for at least 13 years. The Opinion failed to apply the jurisdictional test the Department admittedly uniformly applied to all others.

4. The Opinion misunderstood the status of the law, assuming that the courts had not yet determined that the Single Business Tax was not an income tax subject to the protection of PL 86-272, when in fact this Court of Appeals had determined the SBT was not an income tax in 1977, and the Department had recognized and published this fact over 13 years ago. The question presented by this appeal was not, accordingly, whether the SBT was an income tax subject to PL 86-272 by its terms, but rather whether the Department had correctly interpreted the PL 86-272 test, which its longstanding published administrative practice had determined to be the jurisdictional standard applied for the SBT.

5. The Opinion unfairly and unconstitutionally retroactively forces on Gillette an unfavorable SBT jurisdictional test which the Department has admitted it had not applied to any other potential taxpayer for over 13 years. Gillette is entitled to have the same jurisdictional test

applied to it, as was applied to all other potential taxpayers during the last 13 years.

II. STATEMENT OF FACTS AND BACKGROUND

A. THE OPINION, BASED ON AN ISSUE NOT RAISED BY THE PARTIES, MISUNDERSTOOD THE BASIS FOR THE PARTIES, RELIANCE ON PL 86-272.

On March 1, 1993, this Honorable Court issued its Opinion in this cause, affirming the Tax Tribunal below. The Opinion, incorrectly characterized Gillette's argument in stating,

> "Petitioner argues here, as it did before the Tribunal, that Respondent is prohibited from assessing single business taxes on petitioner for mere solicitation of orders in Michigan by 15 USC 381 (PL 86-272) . . . "

After quoting PL 86-272, the Opinion continued

> "Although not raised as an issue by the parties, we must determine whether PL 86-272 applies in the instant case."

The Opinion next correctly concluded that the SBT is not an income tax to which PL 86-272, by its terms is applicable.

The Opinion next proceeded to determine whether there was sufficient nexus in Michigan to constitutionally apply the SBT to Gillette. It relied heavily upon the Supreme Court's recent opinion in *Quill Corp* v *North Dakota*, 504 US ___; 112 S Ct 1904; 119 L Ed 2d 91 (1992), concluding under the Due Process and Commerce Clause

tests, that Gillette's activities were sufficient to permit Michigan to constitutionally impose the SBT during each of the years at issue.

This Court's statement that the literal applicability of PL 86-272, by its terms, to the SBT had not been raised as an issue by the parties is correct, but not because the parties thought PL 86-272 applied to the SBT, rather because both recognized the Department's 13 year adoption of PL 86-272 as the jurisdictional test to be administratively applied.[1]

This situation had been analyzed by Gillette in its Brief on Appeal, at p 49, where it argued,

> "This Court of Appeals need not consider whether PL 86-272 is the correct test of taxable status in applying the single business tax. PL 86-272 must be applied. To apply a less advantageous nexus test to Gillette than that which was by the Department's own admission uniformly it [sic] applied to all others, would deprive Gillette of equal protection of the law. See *IBM* v *United States,* 343 Fed 2d 914 (Court of Claims 1965); *MCI Telecommunications, Inc.* v *Department of Treasury,* 136 Mich App 28; 355 NW2d 627 (1984) *lv den* 22 Mich 883 (1985) and

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[1] The Department first adopted a use tax jurisdictional test for the SBT in its 1978-3 Single Business Tax Bulletin (Exhibit R-6), then in its 1980-1 Single Business Tax Bulletin (Exhibit R-5) adopted PL 86-272 as its administrative test. The Department asserts it applied the PL 86-272 test in all audits back to 1976, the first year the SBT was effective. The announcement of PL 86-272 as the administrative test was 13 years ago, its application as the administrative test dates to over 15 years ago.

Armco Steel v *Department of Treasury,* 419 Mich 582; 358 NW2d 839 (1984)"

As Gillette argued in its Brief to this Court of Appeals, to do what the Opinion has now done would deprive Gillette of its constitutional rights. As is discussed in more detail below, this Honorable Court is bound by the Michigan and Federal Constitutions to apply the same jurisdictional test to Gillette as was applied to all similarly situated potential taxpayers during the years at issue. This Court cannot constitutionally disregard the admitted fact that the Department applied the PL 86-272 test uniformly to all potential taxpayers, and now retroactively, reaching back nearly 17 years, apply a new, different and more rigorous test to Gillette.

Because the Court of Appeals' current Opinion requires an application of the SBT Act which is unconstitutional under both the Federal and State Constitutions, it cannot stand. Gillette is entitled to have the same test applied to it as was applied to all others similarly situated during these years. This is why the parties did not raise the issue on which this Court based its Opinion. This is why *Gillette* by this Motion for Hearing would request this Honorable Court of Appeals to again address the issue as to whether PL 86-272, applied administratively by the Department to all potential SBT taxpayers during the years at issue, would permit Gillette to be taxed under the SBT Act.

B. THE DEPARTMENT HAS ADMITTED UNIFORM ADMINISTRATION OF THE PL 86-272 TEST.

From the outset of this proceeding, the parties were aware that the Department had chosen to apply PL 86-272 as the Michigan SBT jurisdictional test, notwithstanding the fact that PL 86-272 was not by its terms applicable to SBT type taxes. Gillette established at the outset that the Department had uniformly applied PL 86-272, by pleading this fact and eliciting an admission. The petition, for example, filed by Gillette in the Tax Tribunal on October 29, 1982, Tax Tribunal Docket No. 73916, averred,

> "That the Department has established the uniform policy of not asserting jurisdiction under the act over foreign corporations who would not have been taxable in Michigan under an income tax because falling within the protection of PL 86-272."

The Department's answer was,

> "9. The allegations contained in paragraph 9, are admitted."

Throughout the interrogatories and answers, the depositions, the pleadings and the briefs in the Tax Tribunal, there was frequent reference to, and frequent admissions by the Department that it had uniformly applied PL 86-272 as the administratively adopted standard for determining Michigan's jurisdiction to impose a SBT tax.[2] This should not be a factual issue on this appeal.

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[2] In response to the Petitioner's First Interrogatories, the Department stated, in response to Question 17,

For example, Interrogatory 12 of Petitioner's First Interrogatories, asked,

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> "It is the Department's interpretation that the Legislature intended to exercise its taxing power to the extent permitted by PL 86-272 . . . "

Subsequently, in response to Question 64, the Department reiterated,

> "It is the Department's interpretation that the Legislature intended to exercise its taxing power to the extent permitted by PL 86-272. Single Business Tax Bulletin 1980-1, sets forth examples of what activities exceed the solicitation of sales."

As to the number of other potential taxpayers involved, Petitioner's First Interrogatories, Question 23 inquired,

> "Please state whether the Department has made any effort to, through computer information available to the Department, contact potential SBT taxpayers based out-of-state and which do not file returns in Michigan?"

The Answer was "yes". Question 24 continued,

> "If the answer to the last preceding interrogatory is affirmative, please describe such efforts, specifying the approximate date of the same and the nature of the effort."

The answer was,

> "There have been hundreds. The only ones we have a record of are those pending cases. We send a questionnaire and ask it to be filled out by taxpayers."

When Gillette asked for the location of records of other potential taxpayers with respect to whom the state was applying the PL 86-272 jurisdictional test, in Petitioner's First Interrogatories, Question 28, the Department responded,

> "There is no centralized record concerning the identity of such potential taxpayers. Any such correspondence would be located in the files established for each particular potential taxpayer, if a file was established."

> "Has the Department adopted the position that corporations not taxable under PL 86-272, had Michigan enacted a net income tax in lieu of the single business tax act, will not be taxed by Michigan under the Single Business Tax Act?"

the Department answered,

> "Yes, an administrative policy."

Given that it is well established in this case that the Department uniformly applied PL 86-272 to all other similarly situated taxpayers, by its own admission, the issue as to whether this Honorable Court should reconsider its Opinion in this cause must turn on whether the Court of Appeals, by its order on an issue not raised by either party, can force a different jurisdictional test on Gillette than the jurisdictional test uniformly applied by the Michigan Department of Treasury to all similarly situated taxpayers for over 13 years. Gillette respectfully submits, for the reasons set forth below, this would violate it's [sic] constitutional rights and would therefore be an inappropriate resolution of the issues presented on this appeal.

C. THE COURT OF APPEALS, SIMULTANEOUS OPINION IN *GUARDIAN INDUSTRIES* v *DEPARTMENT OF TREASURY*, DOCKET NO 119601, IS COMPATIBLE WITH THE APPLICATION OF THE PL 86-272 JURISDICTIONAL TEST TO APPELLANT GILLETTE.

Gillette is aware of this Court's opinion in the matter of *Guardian Industries Corporation* v *Department of Treasury*, ___ Mich App ___ (Court of Appeal Docket No. 119601),

which was issued simultaneously with the Opinion in the instant appeal on March 1, 1993. The *Guardian Industries* opinion dealt with the issue as to whether a Michigan taxpayer selling into other states could claim those other states had jurisdiction to tax it. That opinion, in the "throw back" situation, correctly concluded that under the Michigan Act, a Michigan taxpayer was deemed taxable in another state if that state could impose non-income based taxes; for such types of tax PL 86-272 was not the appropriate jurisdictional test. The appropriate test, accordingly, would require less nexus than PL 86-272, again relying primarily upon the U.S. Supreme Court's 1992 decision in *Quill*.

The relationship between this Court's *Gillette* Opinion and its *Guardian Industries* Opinion is obvious.[3] Notwithstanding the fact that both cases ultimately involve a determination as to what tests could be applied to determine constitutional nexus, the answer in the Gillette case must be *different* from the answer in the *Guardian Industries* case.

In *Guardian* this Court of Appeals correctly concluded that a franchise tax on the privilege of doing business or a business privilege tax or a corporate stock tax, which is not imposed on or measured by net income, would not evoke the PL 86-272 protection. Accordingly, for "throw back" purposes, if any of these types of taxes could have been imposed, no "throw back" is required.

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[3] Indeed during oral argument in this case the panel questioned counsel for Gillette as to the relationship between the *Guardian Industries* type "throw back" case and the *Gillette* jurisdiction case.

In the instant case, however, the issue was *not* as this Court's Opinion stated, whether "Respondent is prohibited from assessing single business taxes on Petitioner for the solicitation of orders in Michigan by 15 USC 381 (PL 86-272) . . . " As is discussed below, it was clear to the Department in 1980 that the SBT was not an income type tax. PL 86-272 was not used by the Department as its jurisdictional test because the Department believed it was literally applicable, but rather because the Department wished to impose PL 86-272 as an administrative test. Because the Department had administratively for over 13 years imposed the PL 86-272 test on all taxpayers to determine SBT taxing jurisdiction, Gillette is entitled under the United States and Michigan Constitutions to be treated equally and uniformly.

This is why neither Gillette nor the Department argued for a more aggressive jurisdictional test then that poised by PL 86-272. The Department knew that it was constitutionally required to apply whatever test it applied uniformly. It could not, as is discussed in more detail below, have imposed the test imposed by this Court of Appeals on Gillette. The parties did not brief the issue to which the Court addressed itself, because it is not relevant. The issue which should be decided by this appeal is whether the Tax Tribunal erred in its application of the PL 86-272 test which the Department had administratively adopted and uniformly applied.

III. ARGUMENT

A. THIS COURT OF APPEALS' DECISION VIOLATES THE MICHIGAN AND UNITED STATES CONSTITUTION BY ORDERING UNCONSTITUTIONAL DISCRIMINATION.

1. The Michigan and Federal Constitutional Equal Protection Mandates Apply To This Court Of Appeals In Issuing Opinions and Decisions.

As is unequivocally established below, the Department could not intentionally and systematically administratively apply PL 86-272 as the jurisdictional test to all potential taxpayers other than Gillette, while intentionally applying a different more stringent test (requiring less nexus) to Gillette. This would unquestionably amount to unconstitutional administrative discrimination in violation of both the United States and Michigan Constitutional Equal Protection Provisions (US Const, Am XIV; Const 1963, art 1, § 2) and the Michigan Uniformity of Taxation Provision (Const 1963, art 9, § 3).

As is also established below, the same discriminatory result would be equally unconstitutional if accomplished by the Legislature through legislation. Yet this Court of Appeals, ignoring the issues to which the parties addressed themselves, has by its decision ordered done what neither the Department nor the Legislature could constitutionally do. The intentional and systematic discrimination which follows is just as unconstitutional when resulting from a court order or decision as when resulting from administrative action or from legislation.

This concept is aptly and concisely set out in 16A Am Jur 2d, Constitutional Law, § 742, p 790,

> *"The inhibitions of the Fourteenth Amendment include all the departments of state government, including not only the political, but also the judicial.* Every state official, high and low, is bound by the Fourteenth Amendment. A similar scope is accorded to like state constitutional provisions. *A constitutional mandate to maintain equality before the law and equal laws rests upon the judicial department of government with as much force as upon the other departments."* (Emphasis added)

That this Court of Appeals cannot by its decision order done, what the Department could not by administrative action constitutionally do, is clearly established by the extensive discussion of the application of the Fourteenth Amendment to the state judiciary in *Shelly* v *Kraemer,* 334 US 1, 14-18; 68 S Ct 836; 92 L Ed 1161 (1947). There the Court was dealing with a restrictive covenant discriminating based on race or color. The issue was whether the judiciary in enforcing such a covenant would supply the "state action" necessary to violate the Fourteenth Amendment. In this classic case, the Supreme Court held that it would. The Court in its discussion stated, *inter alia,* at pp 14-18,

> "That the action of state courts and judicial officers in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment, is a proposition which has long been established by decisions of this Court.
>
> * * *

> The short of the matter is that from the time of the adoption of the Fourteenth Amendment until the present, it has been the consistent ruling of this Court that the action of the States to which the Amendment has reference includes action of state courts and state judicial officials . . . it has never been suggested that state court action is immunized from the operation of those provisions simply because the act is that of the judicial branch of the state government."

Consequently, it is clear that this Court of Appeals could not order done what the Legislature is constitutionally prohibited from enacting in legislation, or what the Executive Branch of government is constitutionally prohibited from doing by way of administration. The same equal protection tests apply to state action taken, whether as a result of legislation, administration or a judicial decision. A brief discussion of recent Michigan precedents establishing the constitutional limitations on both administrative actions and on legislative enactments is therefore instructive.

2. The Department of Treasury Could Not In Administering The SBT Have Applied PL 86-272 To Establish Jurisdiction Over All Taxpayers Other Than Appellants, While Intentionally Applying A More Rigorous Jurisdictional Test (Requiring Less Nexus) To Gillette.

The test for unconstitutional administrative discrimination in enforcing a tax act is well established in Michigan. This Court of Appeals in *MCI Telecommunications Corporation* v *Department of Treasury*, 136 Mich App 28; 355

NW2d 627 (1984), lv den 422 Mich 883 (1984), dealt with the possible unconstitutional administration of Michigan's Use Tax. The Court framed the relevant issue, at pp 36-37, as follows:

> "Petitioner's final argument on appeal is that respondent's disparate treatment of petitioner and AT&T amounted to a denial of equal protection. We find no basis for reversal. Petitioner must show that respondent has failed to tax similarly situated enterprises and that its failure to do so was intentional and knowing, rather than mistaken or the result of inadvertence. *Sunday Lake Iron Co* v *Whitfield Township*, 247 US 350; 38 S Ct 495; 62 L Ed 1154 (1918); *Titus* v *State Tax Comm*, 374 Mich 476, 487; 132 NW2d 647 (1965) . . . The tribunal's characterization of respondent's conduct as mistaken, as opposed to intentional, is a factual finding which this Court must uphold if supported by competent, material and substantial evidence.
>
> We believe that the evidence did in fact support a finding that respondent's failure to tax AT&T was a mistake, rather than deliberate discrimination."

Subsequently, the Court of Appeals warned the Department, that to intentionally treat AT&T differently than MCI would result in unconstitutional discrimination. The Court made this clear in stating,

> "In concluding our review of this issue, we find one caveat appropriate. Arguably, continued failure to tax similarly situated enterprises when the taxing authority is aware of a valid equal protection challenge such as the present one can

> itself evidence an ongoing equal protection violation. See *Wakefield, supra,* pp 352-353. Accordingly any continued failure to tax AT&T could result in a violation of petitioner's right to equal protection, particularly for taxes applicable to periods following the release of this opinion. In order to avoid a finding that the imposition of future taxes on petitioner would violate equal protection, respondent should take affirmative steps toward imposing use taxes upon AT&T's analogous purchase of local exchange services."

In *MCI* the Court of Appeals announced that the intentional and systematic application of a different taxation test to two taxpayers engaging in substantially the same activity, would violate the Equal Protection Clauses. The majority found, however, that the Department's failure to appropriately tax AT&T was unintentional, a mistake. It warned that, the Department now being aware of the similarity, continued failure to apply the Act the same way to both AT&T and MCI would result in unconstitutional discrimination.[4]

---

[4] The dissenter in *MCI* would have gone further, and concluded that the Department had already violated MCI's equal protection rights. The dissenter stated, at p 44,

> "I also feel that respondent's imposition of this tax against petitioner violates the equal protection clause . . . The record discloses that the failure to tax these other companies [Michigan Bell and AT&T] was not inadvertent, but based on respondent's finding that interstate communications were involved. Clearly this is an arbitrary and capricious application of the use tax statute and, therefore, violates the equal protection clause. *Yick Wo* v *Hopkins,* 118 U.S. 356, 373; 6 S Ct 1064; 30 L Ed 220 (1886)."

It is well established that a tax administrator intentionally and systematically applying different tests to similarly situated taxpayers would violate the United States and Michigan Equal Protection Clauses. The Department cannot apply the PL 86-272 jurisdictional test to all other potential taxpayers, yet intentionally and systematically apply a different more rigorous test requiring less nexus to Gillette. (The Department, well aware of this law, has never argued that it had the right to apply a different nexus test to Gillette than to other similarly situated taxpayers.) This Court of Appeals cannot now do what the Department could not constitutionally have done.

3. The Legislature Could Not Have Enacted Legislation Applying The PL 86-272 Jurisdictional Test to All Taxpayers Except Gillette, To Which It Applied A Different More Rigorous Test (Requiring Less Nexus).

Just as administrative discrimination in enforcing a statute violates the Equal Protection clauses, so too would discrimination enacted by the legislature in statutory form. One of the most recent Michigan cases on point is *Armco Steel Corporation* v *Department of Treasury*, 419 Mich 582; 358 NW2d 839 (1984). The Michigan Supreme Court had earlier held that the Department in administering the franchise tax, could not conduct field audits, as such audits were not authorized by statute. The Legislature responded by amending the franchise tax act to authorize the field audits (1975 PA 13), but the Court of Appeals concluded the amendment would be given prospective effect. The Department, unable to apply the amendment

to retroactively authorize the field audits it had conducted, canceled or rescinded those deficiencies which remained unpaid, but refused to grant refunds to those corporate taxpayers who had paid such deficiency assessments. Two Court of Appeals panels then affirmed the right of the taxpayers to such refunds.

Faced with approximately $35 Million in taxpayer refunds, the Department again sought legislation, and the Legislature enacted 1978 PA 392, which retroactively validated the Department's field audits and, in addition, declared that all payments received and refunds which had been made on the basis of the audits were valid. There were two consolidated cases. Both panels of the Court of Appeals found 1978 PA 392 unconstitutional in violation of the Equal Protection clauses. The Supreme Court stated the factual circumstances, at p 590,

> "The circumstances prompting the institution of these suits is not disputed. The division admits that following the decision in *IBM*, holding that 1975 P.A. 13 would be given prospective effect only, it refused to rescind deficiency assessments which remained unpaid, but carried out a considered policy to refuse refunds to corporate taxpayers who had requested them. Moreover, it appears that even after the enactment of 1978 P.A. 392, the division continued its disparate treatment of these two groups of taxpayers."

The Supreme Court concluded 1978 PA 392 was therefore unconstitutional, holding, at p 591,

> "Plaintiffs have alleged that the act, as applied to them, violates the Equal Protection Clause of the United States Constitution, and the Equal Protection and the Uniformity of Taxation

Clauses of the Michigan Constitution. US Const, Am XIV; Const 1963, art 1 § 2 and art 9 § 3. This court has held that the rights provided under the Michigan Constitution are coextensive with those provided under the United States Constitution. *Fox* v *Employment Security Comm*, 379 Mich 579, 588; 153 NW2d 644 (1967); *Wolodzko* v *Wayne Circuit Judge*, 382 Mich 528, 534; 170 NW2d 9 (1969). In *Allied Stores of Ohio* v *Bowers*, 358 US 522, 527; 79 S Ct 437; 3 L Ed 2d 480 (1959), the United States Supreme Court stated,

> '[There] is a point beyond which the state cannot go without violating the Equal Protection Clause. The State must proceed upon a rational basis and may not resort to a classification that is palpably arbitrary. The rule has often been stated to be that the classification 'must rest upon some ground of difference having a fair and substantial relation to the object of the legislation.'

These principals are equally applicable to cases involving tax statutes."

The *Armco* Court further reasoned, at p 593,

"The division has failed to suggest any persuasive rational basis justifying its disparate treatment of those corporate taxpayers who paid their deficiency assessments following unauthorized audits and recomputations, and those who did not. Its reasoning that plaintiffs have no basis for complaint because they have paid only what was legally due under the franchise fee act is flawed . . . . even if it is true that plaintiffs have paid only that which was legally due, it is a *non sequitur* to then conclude that plaintiffs have not been denied equal protection of the law [Citing and discussing *Sioux City*

> *Bridge Co* v *Dakota County,* Nebraska, 260 US 441; 43 S Ct 190; 67 L Ed 340 (1923) which the Court acknowledged was factually dissimilar to the instant case, stating that the broader proposition for which it stood was clearly apposite.]

The Court, after further discussion, stated, at pp 595-596,

> "The only distinction existing between them is that one group paid their deficiencies while the other group did not. This is *not* a natural distinguishing characteristic which bears a reasonable relationship to the object of the classification. *Beauty Built Construction Corp. supra,* p 235 [375 Mich 229; 134 NW2d 214 (1965)] The distinction has become important only because of the division's disparate treatment of these two groups."

The Supreme Court then concluded, at p 596,

> "While it is undisputed, therefore, that the Legislature can validate retroactively anything that it could have originally authorized, *it is not empowered to validate the division's persistent discrimination between two groups of taxpayers who are in reality but one class."*

The Opinion of this Court of Appeals in the instant case, would do what the Supreme Court in *Armco Steel* held could not be done by the Legislature. Here the Court of Appeals would determine that the jurisdictional standard for one taxpayer, Gillette, reaching back approximately 15 years, must be different than the jurisdictional standard which the Department admitted it applied to all other similarly situated potential taxpayers. There can be no legitimate distinction between Gillette and all other similarly situated potential taxpayers which would justify

separate classification. Accordingly, Gillette has a constitutional right to have the same jurisdictional test applied to it as the Department has admitted it applied to all others during those years.

This Court of Appeals cannot do by its Opinion what the Legislature could not constitutionally do.

B. THE DEPARTMENT HAS LONG KNOWN THAT THE SINGLE BUSINESS TAX WAS NOT AN INCOME TAX.

The Department's use of the PL 86-272 test to establish Michigan's jurisdiction to impose the SBT when persons from other states solicit sales in Michigan to do business, is *not* based on the Department's belief that the SBT was an income tax, and therefore subject to the PL 86-272 restrictions.[5] That the SBT is not an income tax was made clear by the first appellate decision to test the constitutionality of the SBT. In *Stockler* v *Department of Treasury Department*, 75 Mich App 640, 651; 255 NW2d 718 (1977), this Court of Appeals stated,

> *"We do not perceive the SBT as an income tax.* Although Federal taxable income is used as the

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[5] This Court's Opinion, in footnote 1, said the issue of whether PL 86-272 applied to determine SBT jurisdiction had apparently not yet been resolved in Michigan, citing *Amway Corp* v *Dept of Treasury*, 433 Mich 908; 448 NW2d 348 (1989). The *Amway* case did not relate to this issue, but rather to the "throw back" issue. Amway was based in Michigan and was unquestionably a SBT taxpayer, the question related to the test to be used to determine if other states could tax Amway's activities. As is discussed above, and in this Court's *Guardian Industries* Opinion, these are totally different issues.

> starting point in computing the tax base, it is possible that a taxpayer may have no income and still be subject to the payment of the SBT. Other components of the tax base, *e.g.*, wages, include expenses incurred, a theory not synonymous with income taxes."

The Department's "Single Business Tax Bulletin 1978-3 – Jurisdictional Standard" (Exhibit R-6), citing and quoting from *Stockler,* stated, inter alia,

> "The Single Business Tax Is Not An Income Tax Measured By Net Income.
>
> * * *
>
> (b) *Nexus* – The Single Business Tax, being determined as a tax other than a net income tax or a tax measured by net income, removes the single business tax from the federal limitation on state taxes known as PL 86-272 (1959)"

The Department's subsequently published "Single Business Tax Bulletin 1980-1 – Jurisdictional Standard" (See Exhibit R-5) establishing SBT "jurisdictional standards" and adopting the PL 86-272 test, also cited the earlier *Stockler* decision as support for the Department's conclusion the SBT was *not* an income tax.

The Department did not misunderstand the nature of the SBT, rather it intentionally, deliberately and systematically adopted the PL 86-272 test to determine whether Michigan would assert jurisdiction under the SBT to tax a business based elsewhere which solicited orders for tangible personal property in Michigan. This decision was reaffirmed by the Department's Revenue Administrative Bulletin 89-46, which is currently in effect.

The Department's intentional adoption of PL 86-272 for its SBT jurisdictional test, followed the different position adopted in its Single Business Tax Bulletin 1978-1 – Jurisdictional Standard (Exhibit R-6), where it adopted the test announced by the U.S. Supreme Court for use taxes in *Scripto v Carson*, 362 US 207; 80 S Ct 619; 4 L Ed 2d 660 (1960). The Department's first jurisdictional position in its 1978 Bulletin (Exhibit R-6), adopting the *Scripto* test, is not dissimilar from that adopted by the Court of Appeals in this appeal based on *Quill*, which also determined the jurisdictional test to be applied by a state to require one selling tangible personal property to collect a use tax.[6]

The critical point is that the Department obviously considered essentially the same test adopted by this Court of Appeals, and rejected it in lieu of administratively applying the PL 86-272 test. This decision was unquestionably intentional, and was, as the Department had stated in its Bulletins, based on full knowledge of the fact the SBT was *not* an income tax. PL 86-272 was applied administratively as a guide, not because the Department thought it applicable by its terms.

In other words, the Department, in determining that it would apply PL 86-272 as a jurisdictional test, had not incorrectly interpreted the SBT Act. It well understood

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[6] In *Scripto*, the Court distinguished between the jurisdictional test for taxing a "foreign" seller, and the jurisdictional test for asking the "foreign seller" to collect a use tax, the legal incidence of which was on the seller's customers, where the state would otherwise have great difficulty in ever assessing and collecting the tax. (362 US at 211)

that the SBT was not an income tax, but nevertheless determined that it would apply as the jurisdictional test the PL 86-272 test which was well within its jurisdictional power to constitutionally assert, and which was also the test almost uniformly applied by sister states and the compact states with respect to their principal corporate business tax. This raises two questions. First, can the Department adopt as a jurisdictional test an almost nationally applied standard which is well within its jurisdictional power but which does not extend jurisdiction as far as the Department may constitutionally reach? Secondly, regardless of whether the Department properly adopted PL 86-272 as its jurisdictional standard, could the Department uniformly for 15 years apply PL 86-272 as a jurisdictional standard to all taxpayers other than Gillette, and then retroactively, reaching back 15 years, apply a very different standard requiring substantially less "nexus"?

While the first question as to the Department's power to adopt rules asserting less than its jurisdictional power permitted by statute is of some interest, the second question is critical to this appeal. The relevant opinions of both the United States Supreme Court and the Michigan appellate courts are unanimous in their condemnation of such intentional and systematic discrimination against a single taxpayer. There can be no question but that the Department could not have singled Gillette out as the only exception to its otherwise uniform application of the PL 86-272 jurisdictional standard.

The next step in this analysis is simple. What the Department could not constitutionally do in administering the statute, this Court of Appeals cannot order be

done. Both the Michigan and United States Constitutions forbid such state action which violates their almost identical equal protection clauses.

C. THE TAX COLLECTOR MAY APPLY A LESS RIGOROUS JURISDICTIONAL TEST THAN THE LAW PERMITS BUT MUST STILL APPLY WHATEVER TEST IS USED EQUALLY AND UNIFORMLY.

A distinction must be recognized at the outset. It is clear that a tax assessor *cannot tax more* than it is authorized to tax by the statute. But it is equally clear that the tax assessor *may tax less* than he/she had power to tax, but the practice must be uniform, that is to say all must be treated equally. As is established below, the constitutional guaranty of equal treatment, or uniform taxation, is paramount. Also as was established above, where the Legislature or executive branches of state government cannot themselves discriminate against a taxpayer, neither can the judiciary by ordering the prohibited result.

It may be argued that Gillette has no basis to complain, for the proper constitutional jurisdictional test was applied by the Court of Appeals. As did the *Armco* case, *supra*, the federal and state courts have without exception held this type argument unavailing. When the correct application of a tax statute to a taxpayer conflicts with the constitutional guarantees of equal protection and uniformity, the latter guarantees are paramount. If a rigorous jurisdictional test was properly applied to one taxpayer, and a much less rigorous jurisdictional test applied to all

others, the first taxpayer has the state and federal constitutional right to be treated the same as those similarly situated. The fact that the law permitted the rigorous jurisdictional test applied to one taxpayer will *not* excuse the resulting discrimination. The taxpayer is entitled to be treated the same as those others who are similarly situated. When there exists a conflict between the proper application of tax legislation, and the uniform application of an improper construction of such legislation, the concept of uniformity must prevail.

The most common example of a state exerting less than its full statutory power to tax is found where property taxes, permitted at a specified percentage of true cash value, are systematically and intentionally assessed at a lesser percentage. The tax assessor could have assessed at 50% under the statute, for example, but intentionally and systematically assessed at 30%. Here, all taxpayers are entitled to be assessed at 30%. If the assessor attempts to intentionally assess one taxpayer at 50%, with the others at 30%, the courts have consistently held the constitutional rights of the 50% assessed taxpayer have been violated; it has the constitutional right to be assessed at the same average level of assessment as all other taxpayers similarly situated.

The leading Michigan case on point is *In Re Appeal of General Motors Corp*, 376 Mich 373; 137 NW2d 161 (1965). The Court there addressed this "under assessment" problem, stating at p 378,

> "The twin demands of uniformity and cash value have plagued taxing authorities for years. If the requirement of cash value were met, the requirement of uniformity would also be met,

> but there has been a constant erosion of the concept of cash value. [footnote omitted] The reasons for that erosion need not concern us, other than to note that because of differences in the concept of cash value from one assessing unit to the other, because of the endeavor of an assessor to obtain an advantage for the taxpayers within his district by reducing assessments, or because of the wealth of a unit or the limited needs of its citizens, great disparities in assessments have occurred from governmental unit to governmental unit. Assessments often bear no relation to the actual cash value [footnote omitted] of the property or the level of the assessments in adjoining governmental units."

In this situation, when one taxpayer had been assessed at an average of 83.7% of state equalized value, with the weighted average of all other taxpayers similarly situated at 76% of state equalized value, the Michigan Supreme Court held, at p 379,

> "With the destruction of the standard of cash value, the standard of uniformity becomes even more imperative, not only from tax unit to tax unit but as to the individual taxpayer within a unit. *If there was ever any question as to which should control, the principle of equal treatment regardless of cash value is now recognized as being primary.* See *Titus v State Tax Commission* [374 Mich 476 (1965)]; *Buerger v Allegheny County Board of Property Assessment,* 188 NJ Super 561 (149 A2d 466, 469). As a practical matter, unequal assessments must be reduced to the average level of assessment if the taxpayer is to have a remedy. *In the matter of appeals of Kents,* 34 NJ 21, 25 (166 A2d 763, 765); *City of Passaic v Botany Mills, Inc.,* 72 NJ Super 449, 457 (178 A2d

> 657, 662), *certiorari denied* 37 NJ 231 (181 A2d 13)." (Emphasis added)

This ruling has more recently been reaffirmed in *Ypsilanti Supervisor v State Tax Commission*, 386 Mich 343, 355-356; 192 NW2d 227 (1971),

> "One principle overrides all others in tax matters. '[T]he principle of equal treatment * * * is now recognized as being primary.' *In re Appeal of General Motors Corp*, 376 Mich 373, 379 (1965)."

While some of the Michigan decisions speak of "uniformity," it is clear that in this sense the rights protected by the Michigan Constitutional Uniformity Provision and the Equal Protection Clause are identical. (*Armco Steel Corp v Department, supra* at 591-592)

The United States Supreme Court has similarly held, applying the Equal Protection Clause of the United States Constitution to protect a state taxpayer's Federal Constitutional rights. In *Township of Hillsborough v Cromwell*, 326 US 620, 623-624; 55 S Ct 445; 90 L Ed 358 (1945), the taxpayer complained it was intentionally singled out for taxation while other similarly situated were not. The Court held, at pp 623-624,

> "*The equal protection clause of the Fourteenth Amendment protects the individual from state action which selects him out for discriminatory treatment by subjecting him to taxes not imposed on others of the same class. The right is the right to equal treatment.* He may not complain if equality is achieved by increasing the same taxes of other members of the class to the level of his own. The constitutional requirement, however, is not satisfied if a State does not itself remove the discrimination, but imposes on him against whom

> the discrimination has been directed the burden of seeking an upward revision of the taxes of other members of the same class. *Sioux City Bridge Co v Dakota County,* 260 US 441, 445-447; *Iowa-DesMoines National Bank v Bennett,* 284 US 239, 247; *Cumberland Coal v Board of Revision,* 284 US 23, 28-29" (Emphasis added)

A similar situation had been addressed by the U.S. Supreme Court in *Cumberland Coal Co v Board of Revision of Tax Assessments,* 284 US 23; 52 S Ct 48; 76 L Ed 146 (1931). Where the Court held, at pp 28-29,

> "It is established that the intentional systematic undervaluation by state officials of taxable property of the same class belonging to other owners contravenes the constitutional right of one taxed upon the full value of his property. [citations omitted] In *Sioux City Bridge Co v Dakota County* [260 US 441, 445] (at p 446), this Court, referring to the dilemma presented by a case where one or a few of a class of taxpayers are assessed at one hundred per cent of the value of their property pursuant to statutory requirement and the rest of the class are intentionally assessed at a lower percentage, stated the rule to be as follows:
>
> > 'This Court holds that the right of *the taxpayer whose property alone is taxed at 100 percent of its true cash value is to have his assessment reduced to the percentage of that value at which others are taxed even though this is a departure from the requirement of statute.* The conclusion is based on the principle that where it is impossible to secure both the standard of the true value, and the uniformity and equality required by law, the

> latter requirement is to be preferred as the just and ultimate purpose of the law.' " (Emphasis added)

In the instant case, there is no question as to the Department's intentional and systematic administrative application of the PL 86-272 jurisdictional test to all other persons similarly situated since at least its 1980-1 SBT Bulletin. This precludes the Department, or this Court of Appeals, from applying a different more rigorous retroactive test solely to Gillette, resulting in Gillette paying single business taxes for which all others similarly situated were intentionally and systematically not assessed.

D. WAS THE DEPARTMENT'S SINGLE BUSINESS TAX BULLETIN 1980-1, AND SUBSEQUENT RAB 89-46 ADOPTION OF PL 86-272 AS A JURISDICTIONAL STANDARD FOR THE SBT INVALID?

The SBT Act does not attempt to set out the constitutional nexus standard which the Department should use to enforce the Act. This determination was left to the Department. The Department made its determination by choosing the PL 86-272 standard as a "guide". The Department could have been more aggressive, but chose otherwise. The Department may have concluded that there was some uncertainty as to the proper constitutional jurisdictional test, and adopted PL 86-272 as a jurisdictional standard which it was certain would be upheld. Has this Court of Appeals now held that the Department's administrative selection of a jurisdictional standard is invalid, or illegal? And if so, why?

The Department chose the almost universally applied PL 86-272 standard as an administrative guide. The Department, after selecting PL 86-272, uniformly applied this jurisdictional standard. Its action in this regard does not violate either the Federal or State Constitutions. Likewise, its action does not violate the SBT Act.

In this context, the Department's longstanding published administrative practice relied on by potential taxpayers for over 13 years, should have been enforced, constitutional arguments aside.

In *In Re D'Amico Estate,* 435 Mich 551; 460 NW2d 198 (1990), the Supreme Court dealt with the Department's attempt to retroactively change an 11-year practice of not seeking to tax state lottery proceeds under the inheritance tax. The Court held, at p 558,

> "There not having been a ruling by this court establishing the law in Michigan, *the Department's eleven-year practice of exempting lottery proceeds from inheritance tax on the basis of a ruling by the Attorney General takes on, in our opinion, decisive significance.*" (Emphasis added)

It has always been Michigan law, as was noted by the Court in the *D'Amico Estate* case,

> "This Court has held that 'the construction placed upon a statute by the agency legislatively chosen to administer it is entitled to great weight." *Davis v River Rouge Bd of Ed,* 406 Mich 486, 490; 280 NW2d 453 (1979).

'A leading treatise on statutory construction states:

> 'Interpretations and application of regulations by officers, administrative agencies, departmental heads and others officially charged with the duty of administering and enforcing a statute have great weight in determining the operation of a statute. *The greatest weight attaches to administrative interpretation in favor of parties who have reasonably relied upon it.* [2A Sands, Sutherland Statutory Construction (4th Ed), § 49.05, p 362. Emphasis added]
>
> 'One of the soundest reasons sustaining contemporaneous interpretations of long standing is the fact that *the public has relied on the interpretation*- . . . while the principle here is not strictly that of estoppel running against the government there is some analogy to that principle when the interpretation has been made by a government agency or officer.' [*Id.*, §49.07, p 394. Emphasis added.]

The Supreme Court concluded the Department was bound by its first contemporaneous construction until that point in time when it advised of a different construction.

The Department's PL 86-272 jurisdictional test "guide" is not invalid[7]. In 1980 it was apparent that the Department could have asserted a more rigorous jurisdictional test requiring less nexus. But the Department's PL 86-272 test when adopted was a reasonable test, particularly given the possibility of interstate tax compact audits and recognizing the many cases available as guides to the application of the

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[7] Even if the Department's adoption of the PL 860272 administrative test were invalid, Gillette would still be entitled to equal treatment, the concept of uniformity and equality being more important. See discussion of *In re General Motors, supra.*

PL 86-272 nexus standard. This Honorable Court of Appeals, constitutional arguments aside, was incorrect in finding the Department's administratively adopted PL 86-272 jurisdictional test retroactively invalid. (Cf., *Chocola v Dept of Treasury*, 422 Mich 229, 224-245; 369 NW2d 843 (1985).) If the Department must abandon the legal administrative jurisdictional test it chose to apply, it should be ordered to do so prospectively only.[8]

E. ASIDE FROM CONSTITUTIONAL ARGUMENTS, BASIC FAIRNESS AND FAIR PLAY WOULD REQUIRE THAT ONE RELYING IN GOOD FAITH UPON THE DEPARTMENT'S LONGSTANDING PL 86-272 JURISDICTIONAL PRONOUNCEMENT BE HELD HARMLESS FROM LOSS IF THAT PRONOUNCEMENT IS LATER HELD INVALID.

Even were it not a violation of the United States and Michigan Constitutions for this Court of Appeals to order that Gillette be retroactively for over 13 years subjected to

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[8] It would be impossible for the Department to, now in 1993, retroactively to 1976 change its administrative jurisdictional test to that adopted by this Court of Appeals. First, the *Quill* opinion dates only to 1992. More importantly, neither potential taxpayers nor Department records relating to activity in 1976, for example, are likely to still exist in recoverable form. Any effort by the Department now in 1993, to retroactively apply a different jurisdictional test to corporations soliciting sales in Michigan in 1976, or 1980, would be a meaningless sham. As was noted above in footnote 2, for example, the Department admitted it had not maintained any central record of potential SBT taxpayers, and was not even certain if individual files for such potential taxpayers existed.

a different jurisdictional test than all other similarly situated taxpayers, strong public policy would argue that this Court of Appeals' rejection of the Department's adoption of the PL 86-272 test be prospective only.

If this Court of Appeals wishes to reject the Department's administrative determination to rely on PL 86-272 rather than extending the state's jurisdiction to tax as far as would otherwise have been constitutionally permissible, it should do so prospectively only. Gillette, as have many other corporations soliciting sales in Michigan, has repeatedly for many years been informed by the Department in its Revenue Bulletins, and by its auditors that the Department was applying the PL 86-272 jurisdictional test. Since 1980 many such taxpayers, believing themselves to be within the PL 86-272 definition of permissible "solicitation" will not have filed SBT returns in Michigan. Many such corporations, as with Gillette, will have restricted their sales efforts in Michigan in an attempt to conform with the requirements of PL 86-272. Such corporations will have been less effective in their sales efforts than they would have been had they known it was fruitless to attempt to comply with PL 86-272. Further, such corporations must now pay substantial amounts of single business taxes, reaching back 13 years, including substantial amounts of penalties and interest, which would be due under the test the Department told them it would apply. These corporations would clearly have acted differently in their sales and tax reporting efforts had they known PL 86-272 was not Michigan's SBT jurisdictional test, and would have derived greater business revenues and avoided the payment of very substantial penalties and interest. Some such corporations might even have

avoided doing business in Michigan. The retroactive change by this Honorable Court of Appeals' Opinion of the tests applied by Michigan to establish SBT jurisdiction is accordingly grossly unfair, in addition to being unconstitutional.

In such circumstances the change by this Court of Michigan's jurisdictional standards should be prospective only. In 1 Cooper, *State Administrative Law*, p 267, the author states:

> "There is growing recognition among the state courts of *the healthy principle that a person who relies in good faith on an agency rule should be held harmless from loss if that rule is later held invalid, or is amended.*
>
> * * *
>
> A typical decision which illustrates the general trend is that of the Wyoming court in a tax case. [*Hercules Powder Co. v State Board of Equalization*, 66 Wyo 268, 306, 208 P2d 1096 (1949)] The decision sets forth persuasively the moral and equitable basis for the principle which prohibits an agency from giving retroactive effect to a change in its rules. The case involved an attempt by the Wyoming State Board of Equalization, which administered the state sales and use taxes, to change its position retroactively with respect to the imposition of a sales tax on certain types of transactions. The Board had originally adopted a rule stating that where personal property was purchased by a retailer outside the state of Wyoming and shipped directly to the customer in that state, the receipts were not taxable under the sales tax law. Five years later, the Board amended its rule and undertook to collect taxes

on transactions that had occurred before the amended rule was adopted. In holding that the amendment could not be applied retroactively, the Court declared:

> ' . . . there is no good reason in this day and era that we can perceive why the agencies of the state – unless clearly by statute commanded to act otherwise – should not be held to the same standards of morality, equity, and fair dealing that are exacted by the established courts of the land from the citizenry of the several states. Especially is this so where such bodies have given a contemporaneous construction to a new system of taxation and which they therein have been called upon by their official oaths to inaugurate and administer. Such construction should properly carry decided weight. In the instant case, if the Powder Company had known that the Board would now undertake to succeed in this litigation upon the position it now urges and adopts, it would have been an extremely easy matter for the appellant to have altered the contracts governing the sale of its products so as to have protected itself against such an attempted retroactive change.' " (Emphasis added)

In *Garrison v California Employment Disabilization Commission*, 149 P2d 711 (1944), the California Court of Appeals dealt with the situation where a rule of the insurance commissioner had been abrogated, and the Commission was attempting to retroactively collect funds which the rule had not required be paid. The California Court of Appeals, at p 716, stated,

"Defendant admits these facts, but asserts that the Commission was without power to promulgate the rule in the first place, and that the rule was therefore void and not binding upon it.

It is unnecessary to pass upon the power to make the rule, because the Commission is estopped to take such a position. The doctrine of equitable estoppel of governmental agencies where justice and right require it has but recently been reaffirmed and approved by our supreme court . . . And in that case has repeated the exceedingly apt observation from 48 Harvard Law Review 1299:

> 'If we say with Mr. Justice Holmes, 'Men must turn square corners when they deal with the government,' it is hard to see why the government should not be held to a like standard of rectangular rectitude when dealing with its citizens.'

Therefore, the defendant may not now collect from the insurance company for those employee agents during the period that Rule 8.17 was in effect."

This Court of Appeals in *Penn Mutual Life Insurance Company v Department,* 162 Mich App 123, 133; 412 NW2d 668 (1987), *lv den* 429 Mich 871 (1987), applied its holding of an invalid statutory provision prospectively only, citing from *Placek v Sterling Heights,* 405 Mich 638, 665; 275 NW2d 511 (1979):

> "The benefit of flexibility in opinion application is evident. If a court were absolutely bound by the traditional rule of retroactive application, it would be severely hampered in its ability to make needed changes in the law because of the

chaos that could result in regard to prior enforcement under that law."

The *Penn Mutual* Panel also noted, at p 133,

"The importance of flexibility was also pointed out in *People v Smith,* 405 Mich 418, 432; 275 NW2d 466 (1979):

> 'Like all rules of law its wooden application, resulting in fundamental injustice, is intolerable.' "

In the instant case, even were its ruling not unconstitutional as a deprivation of Gillette's rights under the Fourteenth Amendment, this Court should apply its ruling prospectively. It is fundamentally unfair for the Department to be ordered to retroactively for 15 years change its jurisdictional test, with only Gillette coming under the new retroactive test for many years.

Certainly Bulletin 1980-1 and RAB 89-46 adopting PL 86-272 as the jurisdictional "guide" should be given the same effect as a declaratory ruling of the Department, under the Administrative Procedures Act (MCL 24.263; MSA 3.560(163)). The state policy in this regard is made clear by the statute, which provides "An agency may not retroactively change a declaratory ruling, but nothing in this subsection prevents an agency from prospectively changing a declaratory ruling." Clearly, there is a state policy against retroactively invalidating a longstanding legal ruling published by the Department as its position on the jurisdictional standards it would apply.

In *In Re D'Amico Estate,* 435 Mich 551 (1990), the Court dealt with the Department's attempt to retroactively change its first contemporaneous construction of

Section 34 of the Lottery Act, which made lottery winnings exempt from inheritance tax. The Court concluded the Department could change its position, but only prospectively. The Court held, at p 564,

> "The Department of Treasury should be held to be bound by the first, contemporaneous construction by the state, at least with regard to the estates of persons who purchased lottery tickets before September 14, 1983, when the Department advised inheritance tax field examiners of a 'new development.' "

IV. CONCLUSION

The Opinion of the Court of Appeals in this case is (1) unconstitutional, under the Federal and Michigan Constitutions, (2) against public policy and (3) wholly unfair and inequitable. The Opinion misunderstood the bases for the parties' reliance on PL 86-272 as the SBT jurisdictional test, and incorrectly assumed that the courts had not earlier concluded PL 86-272 was inapplicable to the SBT. The Opinion incorrectly invalidated the Department's 13 year old published adoption of PL 86-272 as the administrative jurisdictional test, which administrative action was legal and constitutional. The Opinion ordered that Gillette be assessed under a different jurisdictional test, much more rigorous (requiring less nexus) than the test applied by the Department to all other potential taxpayers. This Honorable Court should reconsider its Opinion, and decide this case on the same jurisdictional test uniformly, intentionally and systematically applied by the Department since at least 1980, the PL 86-272 test which the parties have argued and briefed

before this Court. This Honorable Court should not let stand its unconstitutional Opinion.

V. RELIEF REQUESTED

WHEREFORE, Petitioner-Appellant, the Gillette Company, respectfully requests that this Honorable Court of Appeals rehear and reconsider its Opinion; recognize the Department's longstanding uniformly applied application of PL 86-272 as the SBT jurisdictional test; and based on the arguments and briefs of the parties determine whether the Department had borne its burden of proving that, under the PL 86-272 test administratively uniformly applied by the Department, Gillette was subject to Michigan's SBT jurisdiction.

Respectfully submitted,

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Dated: March 22, 1993

APPENDIX C

Court of Appeals, State of Michigan

ORDER

RECEIVED MAY 19, 1993

Gillette Co v. Department of Treasury
Docket# 118660
L.C.# 073916, 090676 & 090677

Myron H. Wahls
Presiding Judge

Marilyn J. Kelly
Maureen Pulte Reilly
Judges

The Court orders that the motion for rehearing is DENIED.

A true copy entered and certified by Ella Williams, Chief Clerk, on

(SEAL)

May 18, 1993
Date

/s/ Ella Williams
Chief Clerk

APPENDIX D

STATE OF MICHIGAN

IN THE SUPREME COURT

THE GILLETTE COMPANY,

Petitioner-Appellant,

vs.

MICHIGAN DEPARTMENT OF TREASURY

Respondent-Appellee.

_____/

Supreme Court No.

Court of Appeals No. 118660

MTT Docket Nos. 73916, 90676, 90677

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THE GILLETTE COMPANY'S APPLICATION FOR LEAVE TO APPEAL

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MCL 205.701 et seq.; MSA 7.650(1) 37
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QUESTIONS PRESENTED FOR REVIEW

DID THE COURT OF APPEALS MISUNDERSTAND THE FACTUAL AND LEGAL BASIS FOR THE ISSUES RAISED ON APPEAL, INCORRECTLY ASSUMING THE DEPARTMENT APPLIED PL 86-272 ONLY BECAUSE IT THOUGHT IT WAS BY ITS TERMS APPLICABLE AS FEDERAL LAW?

The Court of Appeals did not address this issue.
The Appellant says "Yes".
The Appellee says "Yes".

DID THE COURT OF APPEALS INCORRECTLY PERCEIVE THE ISSUE BEFORE IT TO BE "IS PL 86-272 APPLICABLE, AS CONTROLLING FEDERAL LAW, TO LIMIT THE MICHIGAN DEPARTMENT OF TREASURY'S RIGHT TO ASSERT JURISDICTION UNDER THE SBT ACT TO TAX COMPANIES FROM OTHER STATES DOING BUSINESS THROUGH INTERSTATE COMMERCE IN MICHIGAN?"

The Court of Appeals did not address this issue.
The Appellant says "Yes".
The Appellee says "Yes".

DOES THE COURT OF APPEALS' SIMULTANEOUSLY ISSUED OPINION IN *GUARDIAN INDUSTRIES v. DEPARTMENT*, DOCKET NO. 119601, REQUIRE ITS HOLDING IN THE INSTANT CASE?

The Court of Appeals implies "Yes"
The Appellant says "No"

DOES THE HOLDING OF THE COURT OF APPEALS IN THIS CASE, WHICH REQUIRES THE DEPARTMENT TO RETROACTIVELY FOR 17 YEARS APPLY TO GILLETTE A DIFFERENT DISADVANTAGEOUS JURISDICTIONAL STANDARD TO DETERMINE TAXABILITY UNDER THE SBT ACT, WHERE THE DEPARTMENT HAS UNIFORMLY APPLIED THE PL 86-272 STANDARD TO ALL OTHER SIMILARLY SITUATED POTENTIAL TAXPAYERS DURING SUCH YEARS, AND COULD NOT POSSIBLY RETROACTIVELY FOR 17 YEARS APPLY THE SAME NEW TEST APPLIED TO GILLETTE TO ALL OTHERS SIMILARLY SITUATED, VIOLATE THE UNIFORMITY OF TAXATION GUARANTEE ESTABLISHED IN ARTICLE 9, § 3 OF THE MICHIGAN CONSTITUTION OF 1963, AS AMENDED?

The Court of Appeals did not address this issue.
The Appellant says "Yes".

DOES THE HOLDING OF THE COURT OF APPEALS IN THIS CASE, WHICH REQUIRES THE DEPARTMENT TO RETROACTIVELY FOR 17 YEARS APPLY TO GILLETTE A DIFFERENT DISADVANTAGEOUS JURISDICTIONAL STANDARD TO DETERMINE TAXABILITY UNDER THE SBT ACT, WHERE THE DEPARTMENT HAS UNIFORMLY APPLIED THE PL 86-272 STANDARD TO ALL OTHER SIMILARLY SITUATED POTENTIAL TAXPAYERS DURING SUCH YEARS, AND COULD NOT POSSIBLY RETROACTIVELY FOR 17 YEARS APPLY THE SAME NEW TEST APPLIED TO GILLETTE TO ALL OTHERS SIMILARLY SITUATED, VIOLATE THE EQUAL PROTECTION PROVISIONS OF BOTH THE MICHIGAN

CONSTITUTION (Const 1963, ART 1, § 2) AND THE UNITED STATES CONSTITUTION (US Const, AM XIV)?

The Court of Appeals did not address this issue.
The Appellant says "Yes"

COULD THE DEPARTMENT, BY ADMINISTRATIVE ACTION, HAVE CONSTITUTIONALLY DONE WHAT THE COURT OF APPEALS HAS, BY ITS HOLDING, ORDERED THE DEPARTMENT TO DO?

The Court of Appeals did not address this question.
The Appellant says "No".

COULD THE LEGISLATURE, BY LEGISLATION, HAVE CONSTITUTIONALLY DONE WHAT THE COURT OF APPEALS HAS, BY ITS HOLDING, ORDERED THE DEPARTMENT TO DO?

The Court of Appeals did not address this question.
The Appellant says "No".

WAS THE COURT OF APPEALS CORRECT IN ITS UNDERSTANDING THAT THE QUESTION OF WHETHER THE SINGLE BUSINESS TAX WAS AN INCOME TAX WAS A QUESTION OF FIRST IMPRESSION, NOT THERETOFORE RESOLVED IN MICHIGAN?

The Court of Appeals held "Yes".
The Appellant says "No".

UNDER MICHIGAN CONSTITUTIONAL LAW, IS THE UNIFORM ADMINISTRATION OF A TAX LAW TO ALL TAXPAYERS OF THE SAME CLASS MORE IMPORTANT, A [sic] THE CORRECT APPLICATION OF THE TAX LAW TO A PARTICULAR TAXPAYER?

The Court of Appeals did not address this question.
The Appellant says "yes".

CAN THE DEPARTMENT CARRYING OUT ITS STATUTORY DELEGATED DUTY OF ADMINISTERING THE SBT ACT, ADOPT AND PUBLISH AS AN ADMINISTRATIVE POLICY A JURISDICTIONAL STANDARD TO BE UNIFORMLY APPLIED TO ALL POTENTIAL SBT TAXPAYERS, NOTWITHSTANDING THE FACT THAT A COURT, AT ANY GIVEN POINT IN TIME, AS A MATTER OF FEDERAL CONSTITUTIONAL LAW, COULD HAVE FASHIONED A DIFFERENT AND MORE AGGRESSIVE JURISDICTIONAL STANDARD?

The Court of Appeals did not address this issue.
The Appellant says "Yes".

WAS THE DEPARTMENT'S ADOPTION OF PL 86-272 AS AN ADMINISTRATIVE JURISDICTIONAL STANDARD FOR USE IN ADMINISTERING THE SBT ACT INVALID, ILLEGAL OR UNCONSTITUTIONAL AS SUCH AN ADMINISTRATIVE STANDARD?

The Court of Appeals did not address this issue.
The Appellant says "No".

WHERE THE LEGISLATURE ENACTS A TAX, IS SILENT AS TO THE CONSTITUTIONAL JURISDICTIONAL TEST TO BE APPLIED, DELEGATES ITS ADMINISTRATION TO THE DEPARTMENT, AND ACQUIESCES FOR 13 YEARS IN THE DEPARTMENT'S ADMINISTRATIVE JURISDICTIONAL STANDARD, SHOULD A COURT APPLY THE DOCTRINE OF LEGISLATIVE ACQUIESCENCE AND APPLY THE LONGSTANDING ADMINISTRATIVE STANDARD?

The Court of Appeals did not address this question.
The Appellant says "Yes".

SHOULD THE COURT OF APPEALS HAVE GIVEN ITS RULING EFFECTIVELY INVALIDATING THE DEPARTMENT'S LONGSTANDING SEVENTEEN YEAR APPLICATION OF PL 86-272 AS ITS JURISDICTIONAL STANDARD PROSPECTIVE EFFECT ONLY, TO AVOID RETROACTIVELY FOR SEVENTEEN YEARS TREATING GILLETTE DIFFERENTLY FROM ALL OTHER SIMILARLY SITUATED TAXPAYERS, IN VIOLATION OF THE FEDERAL AND MICHIGAN CONSTITUTIONAL GUARANTEES?

The Court of Appeals did not address this question
The Appellant says "Yes".

GROUNDS FOR APPEAL

(MCR 7.302(B))

A. The issues, involving the Michigan Department of Treasury (the "Department"), are of *significant public interest* for each of the following reasons.

1. One issue of first impression involves a determination of the correct jurisdictional standard to be used in imposing Michigan's sole business tax, the Single Business Tax (SBT) on multi-state businesses operating in interstate commerce. The public has a significant interest in knowing what jurisdictional test will be applied in the administration of the SBT.

2. One issue of apparent first impression, involves the question of whether the Court of Appeals, on

its own initiative, ignoring the briefs and issues raised by the parties, can order the 17 year retroactive application of a new and different SBT jurisdictional standard than that adopted, published and uniformly applied by the Department, acquiesced in by the Legislature (while amending the Act over two dozen times), and relied upon by Appellant and other potential taxpayers in structuring and organizing their business activities in Michigan for over 13 years? The public has a significant interest in understanding whether the Court of Appeals can substitute its judgment for that of the Department, and order the Department to retroactively 17 years apply a new and different jurisdictional test to a potential SBT taxpayer.

B. The issues involve legal principles of *major significance to the State's jurisprudence,* for the following reasons:

1. One issue, a matter of first impression, involves the identification of the jurisdictional test to be applied in imposing Michigan's sole business tax, the SBT, to potential taxpayers from other states doing business in Michigan in interstate commerce.

2. One issue, apparently of first impression, looks to whether the Court of Appeals, on its own initiative, ignoring the issues and briefs of the parties, can invalidate an otherwise legal and constitutional longstanding administrative jurisdictional standard adopted, published and uniformly applied by the Department over 13 years, and order the 17 year retroactive substitution, affecting a single taxpayer, of a different jurisdictional standard determined by the Court of Appeals?

3. One issue, apparently of first impression, is the question whether the Court of Appeals' holding violated the Equal Protection Clauses of the United States and Michigan Constitutions, and the Michigan Constitutional Uniformity Guarantee, by ordering the Department to 17 years retroactively apply a different jurisdictional standard to determine SBT tax liability of Appellant Gillette, than the jurisdictional standard which the Department had admitted it uniformly applied to all other similarly situated potential taxpayers during these years?

4. One issue involves the question as to whether the Court of Appeals by its holding, can order the Department to do what neither the Department nor the Legislature could have constitutionally done, viz to order the Department to impose a jurisdictional test retroactively 17 years, to determine the liability of a single potential taxpayer for SBT taxes, which test is different than the test the Department admitted it had uniformly applied to all other similarly situated potential taxpayers during those years.

C. The decision of the Court of Appeals is *clearly erroneous and will cause material injustice*, for the following reasons:

1. The Court of Appeals' holding singles out one taxpayer, Appellant Gillette, and subjects it to a SBT jurisdictional test, retroactively to 1976, different and more disadvantageous than the test uniformly applied by the Department to Gillette and all similarly situated potential taxpayers, during that 17 year period.

2. The Court of Appeals' Order will retroactively, for 17 years, force one taxpayer, Appellant Gillette, to pay SBT taxes under a different jurisdictional standard, which Gillette would not have been required to pay had it been subjected to the same jurisdictional standard applied to all other similarly situated potential taxpayers during these years.

D. The decision of the Court of Appeals is *clearly erroneous and conflicts with Supreme Court decisions* for the following reasons:

1. The decision of the Court of Appeals, ordering the 17 year retroactive application against Appellant Gillette of a different and disadvantageous jurisdictional test then that uniformly applied by the Department to all other similarly situated potential taxpayers, conflicts with the decisions of this Supreme Court under Michigan's Uniformity Clause (Const 1963, Art 9, § 3) that one principle overrides all others in tax matters; the principle of equal and uniform treatment is now recognized as being primary. (*In re Appeal of General Motors Corp,* 376 Mich 373, 379; 137 NW2d 161 (1965) and *Ypsilanti Supervisor v State Tax Commission,* 386 Mich 343, 355-356; 192 NW2d 227 (1971))

2. The decision of the Court of Appeals, ordering the 17 year retroactive application against Appellant Gillette of a different and disadvantageous jurisdictional test then that uniformly applied by the Department to all other similarly situated potential taxpayers, conflicts with the decisions of the Michigan and United States Supreme Courts that, "The equal protection clause protects the individual from state action which selects him out for discriminatory treatment by subjecting

him to taxes not imposed on others of the same class." (E.g., *Allegheny Pittsburgh Coal Co v Webster County*, 488 US 336, 345-346; 109 SCt 633; 102 L Ed 2d 688 (1988) and *Armco Steel Corp v Department of Treasury*, 419 Mich 582, 591-592; 358 NW2d 839 (1984).

CONCISE STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

Petitioner-Appellant, the Gillette Company, ("Gillette" or "Appellant") a Delaware corporation with its base of operations in Massachusetts, petitions this Honorable Supreme Court for leave to appeal from the Court of Appeals' May 18, 1993, Order Denying Gillette's Motion for Rehearing of the Court of Appeals' Opinion of March 1, 1993, pursuant to MCR 7.301(A)(2) and 7.302(B)(2),(3) and (5). The Court of Appeals' Order dated May 18, 1993, Denying Rehearing is attached hereto as ***Exhibit A***; the Court of Appeals' March 1, 1993 Opinion as attached hereto as ***Exhibit B*** (the "Opinion").

Gillette is a manufacturer and wholesaler of personal care products, razors and ballpoint pens. It maintained a sales staff which solicited customers in Michigan, taking orders for acceptance in Massachusetts, to be filled by shipment from out of Michigan. Gillette was subjected by Respondent-Appellee, the Michigan Department of Treasury (the "Department" or "Appellee") for the years 1973-1981, to three separate audit proceedings. (Opinion, p 1) Deficiencies were imposed under the Michigan Single Business Tax Act, MCL 208.1 *et seq*; MSA 7.558(1) *et seq* (the "SBT") for the years 1976, the first year the SBT

was effective, through 1981.[1] Gillette protested the SBT taxes assessed in connection with such audits, and appealed to the Michigan Tax Tribunal, where an 8 day hearing was held commencing March 23, 1987 through April 2, 1987, with the Tribunal enterings opinion February 13, 1989, applying the PL 86-272 jurisdictional standard to Gillette's activities and finding that Gillette had engaged in more than that "solicitation" permitted. Gillette's Motion for Rehearing was denied by the Michigan Tax Tribunal on June 12, 1989.

Gillette timely filed its Claim of Appeal to the Court of Appeals and its Brief on Appeal on February 13, 1989, appealing as of right the Tax Tribunal's Opinion and Judgment imposing taxes under the SBT Act for the years 1976-1981.

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[1] The audit for the years 1974 and 1975 involved Gillette's liability under the former corporate income tax, now repealed (MCL 205.136; MSA 7.556(6)). For the years 1974 and 1975, the last years the income tax was effective, the Department concluded it had no jurisdiction to impose the income tax as Gillette was protected by federal legislation, PL 86-272 (attached hereto as ***Exhibit C***). (See Exhibit R-8h and Hearing Transcripts ("Tr") Vol I, pp. 80-87.) A tax was assessed under the SBT, however, the Department initially concluding PL 86-272, applicable only to income type taxes, was inapplicable and that under a different jurisdictional test requiring less "nexus", Gillette was subject to the SBT. The Department reversed its position as to the jurisdictional test for SBT by way of its 1980-1 SBT Jurisdictional Bulletin, dated May 1, 1980 (Exhibit R-5) under which it, as a matter of administrative policy, adopted the otherwise inapplicable PL 86-272 jurisdictional test as the administrative standard to be uniformly applied in Michigan to determine SBT liability.

At the Tax Tribunal hearing, in the briefs and closing arguments submitted at the Tax Tribunal and in the extensive briefs and argument presented in the Court of Appeals, the parties were agreed the crucial issue was whether Gillette had engaged in actions in Michigan in each of the years 1976-1981 which exceeded that "solicitation" permitted under PL 86-272.[2] PL 86-272 is federal law (codified in 15 USC 381), adopted by Congress under its power to regulate interstate commerce, which prohibits the imposition of a state income type tax in certain circumstances, such as where the "foreign" business's contacts with the taxing states are limited to "solicitation" of sales, and all orders are accepted and filled from out-of-state.[3]

While the Department had earlier conceded that the SBT was *not* an income tax and that PL 86-272 was therefore inapplicable as federal law (see e.g., Exhibit R-6: 1978-3 SBT Jurisdictional Bulletin), in 1980 the Department adopted PL 86-272, as an administrative policy, as the SBT jurisdictional standard it would apply to determine SBT jurisdiction over foreign businesses. (Exhibit R-5) The Department has admitted in the record that it had uniformly applied PL 86-272 to all potential taxpayers as the administrative SBT jurisdictional standard, and was still applying PL 86-272 at issue and at the time of trial. (See discussion infra, pp 9-13)

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[2] See, e.g. the Department's "Brief of Appellees" filed in the Court of Appeals, pp 25-26.

[3] (The text of PL 86-272 (15 USC 381) is attached hereto as ***Exhibit C***.)

After the Court of Appeals' oral argument, as both parties had informed the Court of Appeals would happen, the United States Supreme Court handed down its long awaited first interpretation of the meaning of the term "solicitation" as used in PL 86-272, in *Wisconsin Department of Revenue v William Wrigley, Jr. Co.*, ___ US ___; 112 S Ct 2447; 120 L Ed 2d 174 (1992). The parties submitted extensive supplemental briefs as to whether Gillette's activities in Michigan exceeded the "solicitation of orders" permitted under PL 86-272 and the Supreme Court's construction of this language in its *Wrigley* decision. At no time before the Tax Tribunal or Court of Appeals, did either party question the validity of the Department's administrative adoption of the PL 86-272 test as the jurisdictional standard administratively uniformly applied in Michigan. No such question was raised at oral argument before or by the Court of Appeals.

The Court of Appeals' Opinion, ignoring the issues raised by the parties as to the PL 86-272 "solicitation" test, assumed that the parties thought PL 86-272 applicable as federal law according to its terms, and concluded that because the SBT was not an income tax, PL 86-272 was inapplicable, a decision it incorrectly believed to be a question of first impression. The Court of Appeals then, again ignoring the PL 86-272 jurisdiction standard uniformly applied, fashioned its own jurisdictional test, based upon a 1992 U.S. Supreme Court opinion, and ordered that the new jurisdictional test be applied retroactively to Gillette back to 1976. (Opinion, pp 3-4)

Gillette immediately moved for rehearing in the Court of Appeals on March 22, 1993, arguing that the Court of Appeals had misunderstood the basis for the

Department's reliance on, and uniform application of, PL 86-272 as the SBT jurisdictional standard, and that the Court of Appeals' holding discriminated against Gillette in violation of both the Michigan and United States Constitutional Equal Protection and the Michigan Constitutional Uniformity Provisions.[4] The Department did not file any opposition to Gillette's Motion for Rehearing. The Court of Appeals denied this motion on May 18, 1993, without comment.

Other facts are referenced below as relevant. Because the Court of Appeals affirmed the Tax Tribunal's application of PL 86-272 on other grounds, finding the PL 86-272 standard inapplicable and applying a new and different constitutional nexus test not briefed by the parties, most of the facts in the record do not relate to the issue on which the appeal was improvidently decided. The Department's longstanding and uniform application of PL 86-272 as its administrative SBT jurisdictional standard is, however, admitted and established in the record (see discussion infra, pp 9-13) as is its early conclusion that the SBT was not an income tax and therefore PL 86-272 was not applicable as federal law according to its terms. (See fn 1, supra, and discussion infra, pp 24-28)

The Court of Appeals' Opinion did not recognize or address the fact that the Department had adopted PL 86-272 as its administrative jurisdictional standard, which it had for 15 years uniformly applied to Gillette and all similarly situated potential SBT taxpayers. Because the

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[4] Const 1963, art 1 § 2; US Const, AM XIV and Const 1963, Art 9, § 3.

Court of Appeals did not recognize the longstanding administrative standard, but only found PL 86-272 inapplicable as federal law according to its terms, the Court of Appeals did not conclude that the administrative PL 86-272 standard was unconstitutional, illegal, or even inappropriate. The Court of Appeals missed the issue, and misunderstood the facts.

For the reasons and arguments set forth in this Application for Leave to Appeal, Appellant Gillette respectfully requests that the decision of the Court of Appeals be reversed, and remanded to the Court of Appeals with instruction that it recognize the PL 86-272 longstanding administrative jurisdictional standard as applicable during the years at issue, and determine whether the Tax Tribunal erred in applying that standard to the facts in the record before it. Should the Department not disagree or advance any reasonable argument in support of the Court of Appeals' retroactive application of a new disadvantageous SBT jurisdictional test solely to Gillette, Appellant Gillette respectfully requests that this Honorable Supreme Court peremptorily reverse the decision of the Court of Appeals and remand to that Court so that it may determine whether, on the basis of PL 86-272, and the U.S. Supreme Court's decision in *Wisconsin Department of Revenue v Wrigley, supra*. The Department had jurisdiction to subject Gillette to Single Business Taxes for each of the years at issue.[5]

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[5] Where an issue on appeal has not been considered by the Court of Appeals, the favored procedure is to reverse the decision of the Court of Appeals and remand to that Court to determine the previously unconsidered issue. (See MCR 7.302(F) (1)

A. **THE OPINION OF THE COURT OF APPEALS, PERCEIVING AN ISSUE NOT RAISED BY THE PARTIES, MISUNDERSTOOD THE BASIS FOR THE PARTIES' RELIANCE ON PL 86-272 AS AN ADMINISTRATIVE JURISDICTIONAL STANDARD.**

QUESTIONS:

DID THE COURT OF APPEALS MISUNDERSTAND THE FACTUAL AND LEGAL BASIS FOR THE ISSUES RAISED ON APPEAL, INCORRECTLY ASSUMING THE DEPARTMENT APPLIED PL 86-272 ONLY BECAUSE IT THOUGHT IT WAS BY ITS TERMS APPLICABLE AS FEDERAL LAW?

DID THE COURT OF APPEALS INCORRECTLY PERCEIVE THE ISSUE BEFORE IT TO BE "IS PL 86-272 APPLICABLE, AS CONTROLLING FEDERAL LAW, TO LIMIT THE MICHIGAN DEPARTMENT OF TREASURY'S RIGHT TO ASSERT JURISDICTION UNDER THE SBT ACT TO TAX COMPANIES FROM OTHER STATES DOING BUSINESS THROUGH INTERSTATE COMMERCE IN MICHIGAN?"

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and *People v King*, 412 Mich 145, 155; 312 NW2d 629 (1981) and *People v Van Wyck*, 402 Mich 266, 270; 262 NW2d 638 (1978). For this reason your Appellant has addressed in this Application for Leave to Appeal the issues as to why the Court of Appeals' holding should be reversed. Appellant Gillette, if leave to appeal were granted, as to whether the Tax Tribunal would correctly apply the administrative PL 86-272 jurisdictional standard, would hope to brief this issue before this Honorable Supreme Court.

DISCUSSION:

The Court of Appeals affirmed the Tax Tribunal below, but on different grounds. The Opinion, at p 1, incorrectly characterized Gillette's argument in stating,

> "Petitioner argues here, as it did before the Tribunal, that respondent is prohibited from assessing single business taxes on petitioner for mere solicitation of orders in Michigan by 15 USC 381 (PL 86-272) . . . "

After quoting PL 86-272, the Opinion continued at p 2,

> "Although not raised as an issue by the parties, we must determine whether PL 86-272 applies in the instant case."

The Opinion after full discussion correctly concluded that the SBT is not an income tax to which PL 86-272, by its terms is applicable. (This conclusion was never at issue, and has been recognized for years.)

The Opinion next proceeded to determine whether there was sufficient nexus in Michigan to constitutionally apply the SBT to Gillette. It relied heavily upon the Supreme Court's recent "nexus" opinion in *Quill Corp v North Dakota*, 504 US ___; 112 S Ct 1904; 119 L Ed 2d 91 (1992), concluding under the Due Process and Commerce Clause tests, that Gillette's activities were sufficient to permit Michigan to constitutionally impose the SBT during each of the years at issue. (This conclusion was never at issue, and would have been admitted by both parties.)

The Court of Appeals, statement that the applicability of PL 86-272, as a federal law, to the SBT had not been raised as an issue by the parties is correct, but *not* because the parties thought PL 86-272 applied to the SBT,

rather because both recognized the Department's 13 year old adoption of PL 86-272 as the SBT jurisdictional standard was accomplished as an administrative policy.[6]

The Court of Appeals was also incorrect in implying this issue had not been briefed. This situation *had been* analyzed by Gillette in its Brief on Appeal, at p 49, where it argued,

> "This Court of Appeals need not consider whether PL 86-27 is the correct test of taxable status in applying the single business tax. PL 86-272 must be applied. To apply a less advantageous nexus test to Gillette than that which was by the Department's own admission uniformly it [sic] applied to all others, would deprive Gillette of equal protection of the law. See *IBM v United States*, 343 Fed 2d 914 (Court of Claims 1965); *MCI Telecommunications, Inc. v Department of Treasury*, 136 Mich App 28; 355 NW2d 627 (1984) *lv den* 22 Mich 883 (1985) and *Armco Steel v Department of Treasury*, 419 Mich 582; 358 NW2d 839 (1984)"[7]

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[6] See discussion *infra*, pp 9-13. The Department first adopted a use tax jurisdictional test for the SBT in its 1978-3 Single Business Tax Bulletin (Exhibit R-6), then in its 1980.1 Single Business Tax Bulletin (Exhibit R-5) adopted PL 86-272 as its administrative test. The Department asserts it applied the PL 86-272 test in all audits back to 1976, the first year the SBT was effective. The announcement of PL 86-272 as the administrative test was 13 years ago, its application as the administrative test dates to over 17 years ago. See also Appellee's Brief in the Court of Appeals, pp 25-26.

[7] The Department's Brief also specifically explained the Department did *not* believe the SBT was an income tax, and knew PL 86-272 was inapplicable by its terms as federal law, but

B. THE DEPARTMENT HAS ADMITTED UNIFORM ADMINISTRATION OF THE PL 86-272 TEST.

WHILE NOT BRIEFED, OR ADDRESSED BY THE COURT OF APPEALS, THE RECORD ON APPEAL ESTABLISHES BY UNCONTRADICTED COMPETENT EVIDENCE, THAT THE DEPARTMENT UNIFORMLY APPLIED PL 86-272 TO ALL SIMILARLY SITUATED POTENTIAL SBT TAXPAYERS, FOR THE YEARS BEGINNING IN 1976, AS AN ADMINISTRATIVE JURISDICTIONAL STANDARD. THESE FACTS ARE NECESSARY TO ESTABLISH THAT THE COURT OF APPEALS' HOLDING RETROACTIVELY APPLYING A DIFFERENT LESS FAVORABLE JURISDICTIONAL TEST TO GILLETTE MUST DISCRIMINATE AGAINST GILLETTE.

DISCUSSION:

From the outset of this proceeding, the parties were aware that the Department had chosen to apply PL 86-272 as the Michigan SBT jurisdictional test, notwithstanding the fact that PL 86-272 was not by its terms applicable to a modified value added type tax. Gillette established at the outset that the Department had uniformly applied PL 86-272, by pleading this fact in each of its three Petitions, and eliciting this repeated admission. The Petition, for example, filed on October 29, 1982, Tax Tribunal Docket No. 73916, averred in Count I, paragraph 9,

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was administratively adopted by the Department as the jurisdictional standard. (See Appellee's Brief in Court of Appeals, pp 25-26)

> "That *the department has established the uniform policy of not asserting jurisdiction under the act over foreign corporations who would not have been taxable in Michigan under an income tax because falling within the protection of PL 86-272.*" (Emphasis added)

The Department's answer was,

> "9. The allegations contained in paragraph 9, are admitted."[8]

This same admission was set out in Respondent's Answers to Petitioner's Request/Demand for Admissions, where the Department admitted,

> "1. In determining whether there is sufficient jurisdiction or nexus to impose the Single Business Tax, the Department's position is stated precisely in Single Business Tax Bulletin 1980-1, a copy of which is attached."[9]

Deputy Commissioner Hoatlin, called as an adverse witness, on April 1, 1987 further testified that the PL 86-272 test outlined in the Department's 1980-1 Bulletin reflected the administrative jurisdictional standard still applied by the Department. (Tr Vol VII, p 964)

Exhibit P-5, a "Resolution re Adoption of Statement of Information Concerning Practices of Multi State Tax

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[8] Identical admissions were made in the Department's Answers to Gillette's Tax Tribunal Petitions in Docket No. 90676 (tax year 1977) on July 17, 1989 (Count I, paragraphs 8, 9, 10) and in Docket No. 90677 (tax years 1978, 1979, 1980 and 1981) on July 17, 1984. (Count 1, paragraphs 8, 9, 10)

[9] SBT Bulletin 1980-1 is attached as ***Exhibit D***.

Commission States Under Public Law 86-272", describes how the Multi State Tax Commission believed that PL 86-272 should be applied, and contains the certification by Michigan's Commissioner of Revenue, dated July 9, 1986, that,

> " . . . the foregoing statement of 'information concerning practices of multi state tax commission states under public law 86-272' accurately describes the practices presently followed by the State of Michigan and is made pursuant' to the qualifications contained in the attached Resolution 1985-4."

The accuracy of Michigan's Revenue Commissioner's statement was confirmed by the testimony of Deputy Commissioner Hoatlin. (Tr Vol VII, pp 968-969)

The Department's Answers to Petitioner's First Interrogatories, questions 12-14, signed by Frederick Lynch, Administrator, Single Business Tax Division, on May 29, 1984, further confirmed the Department's admissions:

> "Q 12. Has Department adopted the position that a corporation is not taxable under PL 86-272, had Michigan enacted a net income tax in lieu of the Single Business Tax Act, will not be taxed by Michigan under the Single Business Tax Act?
>
> A 12. Yes, and (sic) administrative policy."
>
> "Q 14. If the answer to the last preceding interrogatory is negative, please state the date the Department's position identified in the second to last preceding interrogatory was taken.
>
> A 14. On or about May 1, 1980, retroactive to January 1, 1976."

Throughout the interrogatories and answers, the depositions, the pleadings and the briefs in the Tax Tribunal, there were frequent references to, and frequent admissions by the Department that it had uniformly applied PL 86-272 as the standard administratively adopted for determining Michigan's jurisdiction to tax.[10]

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[10] In response to the Petitioner's First Interrogatories, the Department stated, in response to Question 17,

> "It is the Department's interpretation that the Legislature intended to exercise its taxing power to the extent permitted by PL 86-272 . . . "

Subsequently, in response to Question 64, the Department reiterated,

> "It is the Department's interpretation that the Legislature intended to exercise its taxing power to the extent permitted by PL 86-272. Single Business Tax Bulletin 1980-1, sets forth examples of what activities exceed the solicitation of sales."

As to the number of other potential taxpayers involved, Petitioner's First Interrogatories, Question 23 inquired,

> "Please state whether the Department has made any effort to, through computer information available to the Department, contact potential SBT taxpayers based out-of-state and which do not file returns in Michigan?"

The Answer was "yes". Question 24 continued,

> "If the answer to the last preceding interrogatory is affirmative, please describe such efforts, specifying the approximate date of the same and the nature of the effort."

The answer was,

> "There have been hundreds. The only ones we have a record of are those pending cases. We send a questionnaire and ask it to be filled out by taxpayers."

The record in this case clearly establishes that the Department's use of PL 86-272 as an administrative jurisdictional standard was adopted in 1980 and retroactively applied to the 1976 effective date of the SBT Act. The record establishes that the Department uniformly applied this standard in determining whether persons soliciting sales or doing business in Michigan should be subjected to the SBT tax. If the Court of Appeals' Opinion is allowed to stand, all other businesses similarly situated will have benefitted from the Department's PL 86-272 jurisdictional standard since 1976, but Gillette, alone, will have been subjected to the very different disadvantageous nexus standard ordered by the Court of Appeals. Gillette respectfully submits, for the reasons set forth below, this would violate it's constitutional rights and would therefore be an inappropriate resolution of the issues presented on this appeal.

When Gillette asked for the location of records of other potential taxpayers with respect to whom the state was applying the PL 86-272 jurisdictional test, in Petitioner's First Interrogatories, Question 28, the Department responded,

> "There is no centralized record concerning the identity of such potential taxpayers. Any such correspondence would be located in the files established for each particular potential taxpayer, if a file was established."

C. THE COURT OF APPEALS' SIMULTANEOUS OPINION IN *GUARDIAN INDUSTRIES v DEPARTMENT OF TREASURY*, DOCKET NO 119601, IS COMPATIBLE WITH THE APPLICATION OF THE PL 86-272 JURISDICTIONAL TEST TO APPELLANT GILLETTE.

QUESTION:

DOES THE COURT OF APPEALS' SIMULTANEOUSLY ISSUED OPINION IN *GUARDIAN INDUSTRIES v DEPARTMENT*, DOCKET NO. 119601, REQUIRE ITS HOLDING IN THE INSTANT CASH?

DISCUSSION:

Gillette is aware of the Court of Appeals' opinion in the matter of *Guardian Industries Corporation v Department of Treasury*, ___ Mich App ___; ___ NW2d ___ (Court of Appeals Docket Nos. 119601 and 120048), which was issued simultaneously with the Opinion in the instant appeal on March 1, 1993. The *Guardian Industries* opinion dealt with the issue, whether a Michigan taxpayer selling into other states could claim those other states had jurisdiction to tax it. That opinion, in the "throw back" situation,[11] correctly concluded that under the Michigan SBT

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[11] The "throwback" issue, not involved in the *Gillette* appeal, looks to whether sales shipped from Michigan to another state can be reflected in the numerator of the sales factor, for the purpose of tax base apportionment between the states. (See MCL §§ 208.41-208.53; MSA 7.558(41)-7.558(53) If the other state could have levied a non income franchise type tax on the Michigan shipper, it would be deemed to be taxable in such other state, and those sales would not be included in the numerator of its sales factor fraction, used to apportion tax base to Michigan.

Act, a Michigan taxpayer was deemed taxable in another state if that state could impose non-income based taxes; for such types of tax PL 86-272 was not the appropriate constitutional jurisdictional test. The appropriate test, accordingly, would require less nexus than PL 86-272.

The Court of Appeals presumably saw a relationship between its *Gillette* Opinion and its *Guardian Industries* Opinion.[12] Notwithstanding the fact that both cases ultimately involve a determination as to what tests could be applied to determine constitutional jurisdiction to tax, the answer in the *Gillette* case must be *different* from the answer in the *Guardian Industries* case.

In *Guardian* the Court of Appeals correctly concluded that a franchise tax on the privilege of doing business, or a business privilege tax, or a corporate stock tax, which is not imposed on or measured by net income, would not evoke the PL 86-272 protection. Accordingly, for "throw back" purposes, if this type of tax could have been imposed, no "throw back" is required.

In the instant case, however, the issue was *not* whether "Respondent is prohibited from assessing single business taxes on Petitioner for the solicitation of orders in Michigan by 15 USC 381 (PL 86-272) . . . " As is discussed below, it was clear to the Department that the SBT was *not* an income type tax. PL 86-272 was not used by the Department as its jurisdictional test because the

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[12] Indeed during oral argument in this case the panel questioned counsel for Gillette as to the relationship between the *Guardian Industries* type "throw back" case and the *Gillette* jurisdiction case.

Department believed it was literally applicable as federal law. Rather the Department wished to impose PL 86-272 as an administratively adopted jurisdictional standard.

This is why neither Gillette nor the Department argued for a more aggressive jurisdictional test then [sic] that poised [sic] by PL 86-272. The Department knew that it was constitutionally required to apply whatever test it applied uniformly. It knew it could not, as is discussed in more detail below, have imposed the test imposed by the Court of Appeals on Gillette. The parties did not brief the issue the Court addressed because it was not relevant. The issue which should have been decided by this appeal is whether the Tax Tribunal erred in its application of the PL 86-272 test which the Department had administratively adopted and uniformly applied.

D. THE COURT OF APPEALS' DECISION ORDERS UNCONSTITUTIONAL DISCRIMINATION.

QUESTIONS:

DOES THE HOLDING OF THE COURT OF APPEALS IN THIS CASE, WHICH REQUIRES THE DEPARTMENT TO RETROACTIVELY FOR 17 YEARS APPLY TO GILLETTE A DIFFERENT DISADVANTAGEOUS JURISDICTIONAL STANDARD TO DETERMINE TAXABILITY UNDER THE SBT ACT, WHERE THE DEPARTMENT HAS UNIFORMLY APPLIED THE PL 86-272 STANDARD TO ALL OTHER SIMILARLY SITUATED POTENTIAL TAXPAYERS DURING SUCH YEARS, AND COULD NOT POSSIBLY RETROACTIVELY FOR 17 YEARS APPLY THE SAME NEW TEST APPLIED TO

GILLETTE TO ALL OTHERS SIMILARLY SITUATED, VIOLATE THE UNIFORMITY OF TAXATION GUARANTEE ESTABLISHED IN ARTICLE IX, SECTION 3 OF THE MICHIGAN CONSTITUTION OF 1963, AS AMENDED?

DOES THE HOLDING OF THE COURT OF APPEALS IN THIS CASE, WHICH REQUIRES THE DEPARTMENT TO RETROACTIVELY FOR 17 YEARS APPLY TO GILLETTE A DIFFERENT DISADVANTAGEOUS JURISDICTIONAL STANDARD TO DETERMINE TAXABILITY UNDER THE SBT ACT, WHERE THE DEPARTMENT HAS UNIFORMLY APPLIED THE PL 86-272 STANDARD TO ALL OTHER SIMILARLY SITUATED POTENTIAL TAXPAYERS DURING SUCH YEARS, AND COULD NOT POSSIBLY RETROACTIVELY FOR 17 YEARS APPLY THE SAME NEW TEST APPLIED TO GILLETTE TO ALL OTHERS SIMILARLY SITUATED, VIOLATE THE EQUAL PROTECTION PROVISIONS OF BOTH THE MICHIGAN CONSTITUTION (Const 1963, ART 1, § 2 AND THE UNITED STATES CONSTITUTION (US CONST, AM XIV)?

DISCUSSION:

1. **The Michigan And Federal Constitutional Equal Protection Mandates And The Michigan Tax Uniformity Guarantee Apply To Opinions And Decisions Of The Court Of Appeals.**

QUESTION:

CAN THE COURT OF APPEALS ORDER DISCRIMINATION IN THE ADMINISTRATION OF THE SBT,

WHICH NEITHER THE LEGISLATURE (BY LEGISLATION) NOR THE DEPARTMENT (BY ADMINISTRATIVE ACTION) COULD HAVE CONSTITUTIONALLY ACCOMPLISHED?

DISCUSSION:

As is unequivocally established below, the Department could not intentionally and systematically administratively apply PL 86-272 as the jurisdictional test to all potential taxpayers other than Gillette, while intentionally applying a different more stringent test (requiring less nexus) to Gillette. This would unquestionably amount to unconstitutional administrative discrimination in violation of both the United States and Michigan Constitutional Equal Protection Provisions (US Const, Am XIV; Const 1963, art 1, § 2) and the Michigan Uniformity of Taxation Provision (Const 1963, art 9, § 3).[13]

As is also established below, the same discriminatory result would be equally unconstitutional if accomplished by the Legislature through legislation. Yet the Court of Appeals, ignoring the issues to which the parties addressed themselves, by its decision ordered done what neither the Department nor the Legislature could constitutionally do. *The intentional and systematic discrimination which follows is just as unconstitutional when resulting from a court decision as when resulting from administrative action or from legislation.*

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[13] Const 1963, Art 9, § 3: "Every tax other than the general ad valorem tax shall be uniform upon the class or classes on which it operates."

This concept is aptly and concisely set out in 16A Am Jur 2d, *Constitutional Law*, § 742, p 790,

> *"The inhibitions of the Fourteenth Amendment include all the departments of state government, including not only the political, but also the judicial.* Every state official, high and low, is bound by the Fourteenth Amendment. A similar scope is accorded to like state constitutional provisions. *A constitutional mandate to maintain equality before the law and equal laws rests upon the judicial department of government with as much force as upon the other departments."* (Emphasis added)

That the Court of Appeals cannot order done, what the Department could not by administrative action constitutionally do, is clearly established by the extensive discussion of the application of the Fourteenth Amendment to the state judiciary in *Shelly v Kraemer*, 334 US 1, 14-18; 68 S Ct 836; 92 L Ed 1161 (1947). There the Court was dealing with a restrictive covenant discriminating based on race or color. The issue was whether the judiciary in enforcing such a covenant would supply the "state action" necessary to violate the Fourteenth Amendment. In this classic case, the Supreme Court held that it would. The Court in its discussion stated, *inter alia*, at pp 14-18,

> "That the action of state courts and judicial officers in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment, is a proposition which has long been established by decisions of this Court.
>
> * * *
>
> The short of the matter is that from the time of the adoption of the Fourteenth Amendment

> until the present, it has been the consistent ruling of this Court that *the action of the States to which the Amendment has reference includes action of state courts and state judicial officials . . . it has never been suggested that state court action is immunized from the operation of those provisions simply because the act is that of the judicial branch of the state government."* (Emphasis added)

Consequently, it is clear that this Court of Appeals could not order done what the Legislature is constitutionally prohibited from enacting in legislation, or what the executive branch of government is constitutionally prohibited from doing by way of administration. The same equal protection tests apply to state action taken, whether as a result of legislation, administrative action or judicial decision. A brief discussion of recent Michigan precedents establishing the constitutional limitations on both administrative actions and on legislative enactments is therefore necessary.

2. **The Department Of Treasury Could Not In Administering The SBT Have Applied PL 86-272 To Establish Jurisdiction Over All Taxpayers Other Than Gillette, While Intentionally Applying A More Rigorous Jurisdictional Test (Requiring Less Nexus) To Gillette.**

QUESTION:

COULD THE DEPARTMENT, BY ADMINISTRATIVE ACTION, HAVE CONSTITUTIONALLY DONE WHAT THE COURT OF APPEALS HAS, BY ITS HOLDING, ORDERED THE DEPARTMENT TO DO?

DISCUSSION:

The test for unconstitutional administrative discrimination in enforcing a tax act is well established in federal law, and in Michigan. The Court of Appeals in *MCI Telecommunications Corporation v Department of Treasury*, 136 Mich App 28; 355 NW2d 627 (1984), *lv den* 422 Mich 883 (1984), dealt with the possible unconstitutional administration of Michigan's use tax. The Court framed the relevant issue, at pp 36-37, as follows:

> "Petitioner's final argument on appeal is that respondent's disparate treatment of petitioner and AT&T amounted to a denial of equal protection. We find no basis for reversal. Petitioner must show that respondent has failed to tax similarly situated enterprises and that its failure to do so was intentional and knowing, rather than mistaken or the result of inadvertence. *Sunday Lake Iron Co v Whitfield Township*, 247 US 350; 38 S Ct 495; 62 L Ed 1154 (1918); *Titus v State Tax Comm*, 374 Mich 476, 487; 132 NW2d 647 (1965) . . . The tribunal's characterization of respondent's conduct as mistaken, as opposed to intentional, is a factual finding which this Court must uphold if supported by competent, material and substantial evidence.
>
> We believe that the evidence did in fact support a finding that respondent's failure to tax AT&T was a mistake, rather than deliberate discrimination."

Subsequently, the Court of Appeals warned the Department, that to intentionally treat AT&T differently than MCI would result in unconstitutional discrimination. The Court made this clear in stating,

"In concluding our review of this issue, we find one caveat appropriate. Arguably, continued failure to tax similarly situated enterprises when the taxing authority is aware of a valid equal protection challenge such as the present one can itself evidence an ongoing equal protection violation. See *Wakefield, supra,* pp 352-353. Accordingly any continued failure to tax AT&T could result in a violation of petitioner's right to equal protection, particularly for taxes applicable to periods following the release of this opinion. In order to avoid a finding that the imposition of future taxes on petitioner would violate equal protection, respondent should take affirmative steps toward imposing use taxes upon AT&T's analogous purchase of local exchange services."

In *MCI* the Court of Appeals announced that the intentional and systematic application of a different taxation test to two taxpayers engaging in substantially the same activity, would violate the Equal Protection Clauses. The majority found, however, that the Department's failure to appropriately tax AT&T was unintentional, a mistake. It warned that, the Department now being aware of the similarity, continued failure to apply the Act the same way to both AT&T and MCI would result in unconstitutional discrimination.[14]

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[14] The dissenter in *MCI* would have gone further, and concluded that the Department had already violated MCI's equal protection rights. The dissenter stated, at p 44,

"I also feel that respondent's imposition of this tax against petitioner violates the equal protection clause . . . The record discloses that the failure to tax these other companies [Michigan Bell and AT&T] was not inadvertent, but based on respondent's finding

It is well established that a tax administrator intentionally and systematically applying different tests to similarly situated taxpayers would violate the United States and Michigan Equal Protection Clauses.[15] The Department cannot apply the PL 86-272 jurisdictional test to all other potential taxpayers, yet intentionally and systematically apply a different more rigorous test requiring less nexus to Gillette. (The Department, well aware of this law, has never argued that it had the right to apply a different nexus test to Gillette than to other similarly situated taxpayers.) This Court of Appeals cannot now do what the Department could not constitutionally have done.

3. **The Legislature Could Not Have Enacted Legislation Applying The PL 86-272 Jurisdictional Test to All Taxpayers Except Gillette. To Which It Applied A Different More Rigorous Test (Requiring Less Nexus).**

QUESTION:

COULD THE LEGISLATURE, BY LEGISLATION, HAVE CONSTITUTIONALLY DONE WHAT THE

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that interstate communications were involved. Clearly this is an arbitrary and capricious application of the use tax statute and, therefore, violates the equal protection clause. *Yick Wo v. Hopkins*, 118 U.S. 356, 373; 6 S Ct 1064; 30 L Ed 220 (1886)."

[15] See, e.g., *Sunday Lake Iron Co. v Whitfield Twp.*, 247 US 350; 38 S Ct 495; 62 L Ed 1154 (1918) and *Titus v State Tax Commission*, 324 Mich 476; 132 NW2d 647 (1965).

COURT OF APPEALS HAS, BY ITS HOLDING, ORDERED THE DEPARTMENT TO DO?

DISCUSSION:

Just as administrative discrimination in enforcing a statute violates the Equal Protection clauses, so too would such discrimination enacted by the Legislature in statutory form. One of the most recent Michigan cases on point is *Armco Steel Corporation v Department of Treasury*, 419 Mich 582; 358 NW2d 839 (1984). This Supreme Court had earlier held that the Department in administering the franchise tax, could not conduct field audits, as such audits were not authorized by statute. The Legislature responded by amending the franchise tax act to authorize the field audits (1975 PA 13), but the Court of Appeals concluded the amendment would be given prospective effect. The Department, unable to apply the amendment to retroactively authorize the field audits it had conducted, canceled or rescinded those deficiencies which remained unpaid, but refused to grant refunds to those corporate taxpayers who had paid such deficiency assessments. The Court of Appeals panel affirmed the right of the taxpayers to such refunds.

Faced with approximately $35 Million in taxpayer refunds, the Department again sought legislation, and the Legislature enacted 1978 PA 392, which retroactively validated the Department's field audits and, in addition, declared that all payments received and refunds which had been made on the basis of the audits were valid. There were two consolidated cases. Both panels of the Court of Appeals found 1978 PA 392 unconstitutional in

violation of the Equal Protection clauses. This Supreme Court stated the factual circumstances, at p 590,

> "The circumstances prompting the institution of these suits is not disputed. The division admits that following the decision in *IBM*, holding that 1975 P.A. 13 would be given prospective effect only, it refused to rescind deficiency assessments which remained unpaid, but carried out a considered policy to refuse refunds to corporate taxpayers who had requested them. Moreover, it appears that even after the enactment of 1978 P.A. 392, the division continued its disparate treatment of these two groups of taxpayers."

This Supreme Court in *Armco* concluded 1978 PA 392 was therefore unconstitutional, holding, at p 591,

> "Plaintiffs have alleged that the act, as applied to them, violates the Equal Protection Clause of the United States Constitution, and the Equal Protection and the Uniformity of Taxation Clauses of the Michigan Constitution. US Const, Am XIV; Const 1963, art 1 § 2 and art 9 § 3. This court has held that the rights provided under the Michigan Constitution are coextensive with those provided under the United States Constitution. *Fox v Employment Security Comm*, 379 Mich 579, 588; 153 NW2d 644 (1967); *Wolodzko v Wayne Circuit Judge*, 382 Mich 528, 534; 170 NW2d 9 (1969). In *Allied Stores of Ohio v Bowers*, 358 US 522, 527; 79 S Ct 437; 3 L Ed 2d 480 (1959), the United States Supreme Court stated,
>
> > '[There] is a point beyond which the state cannot go without violating the Equal Protection Clause. The State must proceed upon a rational basis and may not resort to a classification that is palpably arbitrary.

> The rule has often been stated to be that the classification 'must rest upon some ground of difference having a fair and substantial relation to the object of the legislation.'
>
> *These principals are equally applicable to cases involving tax statutes."*

The *Armco* Court further reasoned, at p 593,

> "The division has failed to suggest any persuasive rational basis justifying its disparate treatment of those corporate taxpayers who paid their deficiency assessments following unauthorized audits and recomputations, and those who did not. Its reasoning that plaintiffs have no basis for complaint because they have paid only what was legally due under the franchise fee act is flawed. . . . even if it is true that plaintiffs have paid only that which was legally due, it is a *non sequitur* to then conclude that plaintiffs have not been denied equal protection of the law [Citing and discussing *Sioux City Bridge Co v Dakota County,* Nebraska, 260 US 441; 43 S Ct 190; 67 L Ed 340 (1923) which the Court acknowledged was factually dissimilar to the instant case, stating that the broader proposition for which it stood was clearly apposite.]

This Court, after further discussion, stated, at pp 595-596,

> "The only distinction existing between them is that one group paid their deficiencies while the other group did not. This is *not* a natural distinguishing characteristic which bears a reasonable relationship to the object of the classification. *Beauty Built Construction Corp, supra,* p 235 [375 Mich 229; 134 NW2d 214 (1965)] distinction has become important only because of the division's disparate treatment of these two groups."

This Supreme Court then concluded, at p 596,

> "While it is undisputed, therefore, that the Legislature can validate retroactively anything that it could have originally authorized, *it is not empowered to validate the division's persistent discrimination between two groups of taxpayers who are in reality but one class.*"

The Opinion of this Court of Appeals in the instant case would do what this Supreme Court in *Armco Steel* held could not be done by the Legislature. Here the Court of Appeals would determine that the jurisdictional standard for one taxpayer, Gillette, reaching back approximately 17 years, must be different than the jurisdictional standard which the Department admitted it uniformly applied to all other similarly situated potential taxpayers. There can be no legitimate distinction between Gillette and all other similarly situated potential taxpayers which would justify this separate classification.

E. THE DEPARTMENT, THE BAR AND ALL POTENTIAL SBT TAXPAYERS HAVE LONG KNOWN THAT THE SINGLE BUSINESS TAX WAS NOT AN INCOME TAX.

QUESTION:

WAS THE COURT OF APPEALS CORRECT IN ITS UNDERSTANDING THAT THE QUESTION OF WHETHER THE SINGLE BUSINESS TAX WAS AN INCOME TAX WAS A QUESTION OF FIRST IMPRESSION, NOT THERETOFORE RESOLVED IN MICHIGAN?

DISCUSSION:

The Department's use of the PL 86-272 test to establish Michigan's jurisdiction to impose the SBT on persons from other states doing business in Michigan, is *not* based on the Department's belief that the SBT was an income tax, and therefore subject to the PL 86-272 restrictions.[16] The Court of Appeals missed the issue. The Department has known and has informed all concerned from the outset that the SBT was not an income tax and that PL 86-272 did not literally apply.[17] The reasons the parties had not briefed the issue as to the applicability of PL 86-272 as an SBT jurisdictional standard, was because both the petitioner and the respondent Department knew PL 86-272 had never been viewed by the Department, or anyone else, as literally applicable. Both parties knew the

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[16] The Court of Appeals' Opinion, in footnote 1, said the issue of whether PL 86-272 applied to determine SBT jurisdiction had apparently not yet been resolved in Michigan, citing *Amway Corp v Dept of Treasury*, 433 Mich 908; 448 NW2d 348 (1989). The *Amway* case did not relate to this issue, but rather to the "throw back" issue. Amway was based in Michigan and was unquestionably a SBT taxpayer, the question related to the test to be used to determine if other states could tax Amway's activities. As is discussed above, and in the Court of Appeals' *Guardian Industries* Opinion, these are totally different issues.

[17] See Opper, *Constitutional Aspects of The Single Business Tax Act*, 22 Wayne L Rev 1170-1171 (1976), In The Department's June 15, 1976 "Single Business Tax Questions and Answers", the Department stated, just six months after the SBT Act was first effective,

> "A. We conclude that the SBT is not a net income tax or measured by net income, that [15 USC § 381 (1976)] will not be used to determine nexus."

Department had intentionally adopted, as an administrative policy, PL 86-272 as a convenient administratively applied jurisdictional standard. The Court of Appeals completely misunderstood.

That the SBT is not an income tax was made clear by the first appellate decision to test the constitutionality of the SBT. In *Stockler v Department of Treasury Department* [sic], 75 Mich App 640, 651; 255 NW2d 718 (1977), the Court of Appeals stated,

> *"We do not perceive the SBT as an income tax.* Although Federal taxable income is used as the starting point in computing the tax base, it is possible that a taxpayer may have no income and still be subject to the payment of the SBT. Other components of the tax base, *e.g.*, wages, include expenses incurred, a theory not synonymous with income taxes."

The Department's *"Single Business Tax Bulletin 1978-3 – Jurisdictional Standard"* (Exhibit R-6), citing and quoting from *Stockler*, stated, inter alia,

> "The Single Business Tax Is Not An Income Tax Measured By Net Income.
>
> * * *
>
> (b) *Nexus* – The Single Business Tax, being determined as a tax other than a net income tax or a tax measured by net income, removes the single business tax from the federal limitation on state taxes known as PL 86-272 (1959)"

The Department's subsequently published *"Single Business Tax Bulletin 1980-1 – Jurisdictional Standard"* (See Exhibit R-5) establishing SBT "jurisdictional standards"

and administratively adopting the PL 86-272 test, also cited the earlier *Stockler* decision as support for the Department's conclusion the SBT was *not* an income tax.

The Department did not misunderstand the nature of the SBT, rather it intentionally, deliberately and systematically adopted the PL 86-272 test as its administrative standard or test to determine whether Michigan would assert jurisdiction under the SBT to tax a business based elsewhere which did business with Michigan through interstate commerce. This decision was reaffirmed by the Department's Revenue Administrative Bulletin ("RAB") 89-46,[18] which was in effect when the Court of Appeals' Opinion in this matter was handed down.

It is important to note that the Department earlier considered essentially the same constitutional test adopted by the Court of Appeals, and rejected it in 1980, to administratively adopt the PL 86-272 test.[19] This decision was unquestionably intentional, and was, as the Department had stated in its Bulletins, based on full

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[18] Attached hereto as ***Exhibit E.***

[19] The Department's intentional administrative adoption of PL 86-272 for its SBT jurisdictional test, followed the different position adopted in its Single Business Tax Bulletin 1978-1 – Jurisdictional Standard (Exhibit R-6), where it adopted the test announced by the U.S. Supreme Court for use taxes in *Scripto v Carson*, 362 US 207; 80 S Ct 619; 4 L Ed 2d 660 (1960). The Department's first jurisdictional position in its 1978 Bulletin (Exhibit R-6), adopting the *Scripto* test, is not dissimilar from that adopted by the Court of Appeals in this appeal based on *Quill*, which also determined the jurisdictional test to be applied by a state to require one selling tangible personal property to collect a use tax.

knowledge that the SBT was *not* an income tax. PL 86-272 was applied administratively as a standard, not because the Department thought it applicable as federal law by its terms.

This raises two questions. First, can the Department adopt as a jurisdictional test an almost nationally applied standard which is well within its jurisdictional power but which does not extend jurisdiction as far as the Department might constitutionally have reached? Secondly, regardless of whether the Department properly adopted PL 86-272 as its jurisdictional standard, could the Department uniformly for 13 years apply PL 86-272 as a jurisdictional standard to all taxpayers other than Gillette, and then retroactively, reaching back 17 years, apply a very different standard to Gillette requiring substantially less "nexus"?

While the first question as to the Department's power to adopt rules possibly asserting less than the jurisdictional power it could have constitutionally asserted is of some interest,[20] the second question, discussed next, is critical to this appeal. There can be no question but that neither the Department nor the Court of Appeals could have singled Gillette out as the only exception to its otherwise uniform administrative application of the PL 86-272 jurisdictional standard.

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[20] See discussion infra pp 28-34.

F. THE TAX COLLECTOR MAY APPLY A LESS RIGOROUS JURISDICTIONAL TEST THAN THE LAW PERMITS BUT MUST STILL APPLY WHATEVER TEST IS USED EQUALLY AND UNIFORMLY.

QUESTION:

UNDER MICHIGAN CONSTITUTIONAL LAW, IS THE UNIFORM ADMINISTRATION OF A TAX LAW TO ALL TAXPAYERS OF THE SAME CLASS MORE IMPORTANT, THAN THE CORRECT APPLICATION OF THE TAX LAW TO A PARTICULAR TAXPAYER?

DISCUSSION:

A distinction must be recognized at the outset. It is clear that a tax assessor *cannot tax more* than it is authorized to tax by the statute. But it is equally clear that if the tax assessor *taxes less* than he/she had power to tax, the practice must be uniform, that is to say all must be treated equally. As is established below, the constitutional guaranty of equal treatment, or uniform taxation, is paramount.

It may be argued that Gillette has no basis to complain, for a proper constitutional jurisdictional test was applied by the Court of Appeals. As did the *Armco* case, *supra,* the federal and state courts have without exception held this type argument unavailing. When the correct application of a tax statute to a taxpayer conflicts with the constitutional guarantees of equal protection and uniformity, the latter guarantees are paramount. If a rigorous jurisdictional test was properly applied to one taxpayer, and a much less rigorous jurisdictional test applied to all

others, the first taxpayer has a state and federal constitutional right to be treated the same as those similarly situated. The fact that the law permitted the rigorous jurisdictional test applies to one taxpayer will *not* excuse the resulting discrimination. When there exists a conflict between the proper application of tax legislation, and the uniform application of an improper construction of such legislation, the concept of uniformity must prevail.

The most common example of a tax administrator exerting less than its full statutory power to tax is found where property taxes, permitted at a specified percentage of true cash value, are systematically and intentionally assessed at a lesser percentage. The tax assessor could have assessed at 50% under the statute, for example, but intentionally and systematically assessed at 30%. Here, all taxpayers are entitled to be assessed at 30%. If the assessor attempts to intentionally assess one taxpayer at 50%, with the others at 30%, the courts have consistently held the constitutional rights of the 50% assessed taxpayer have been violated; it has the constitutional right to be assessed at the same average level of assessment as all other taxpayers similarly situated.

The leading Michigan case on point is *In Re Appeal of General Motors Corp*, 376 Mich 373; 137 NW2d 161 (1965). The Court there addressed this "under assessment" problem, faced with a situation where one taxpayer had been assessed at an average of 83.7% of state equalized value, with the weighted average of all other taxpayers similarly situated at 76% of state equalized value. This Michigan Supreme Court held, at p 379,

> "With the destruction of the standard of cash value, the standard of uniformity becomes even more imperative, not only from tax unit to tax unit but as to the individual taxpayer within a unit. *If there was ever any question as to which should control, the principle of equal treatment regardless of cash value is now recognized as being primary.* See *Titus v State Tax Commission* [374 Mich 476 (1965)]; *Buerger v Allegheny County Board of Property Assessment,* 188 NJ Super 561 (149 A2d 466, 469). As a practical matter, unequal assessments must be reduced to the average level of assessment if the taxpayer is to have a remedy. *In the matter of appeals of Kents,* 34 NJ 21, 25 (166 A2d 763, 765); *City of Passaic v Botany Mills, Inc.,* 72 NJ Super 449, 457 (178 A2d 657, 662), *certiorari denied* 37 NJ 231 (181 A2d 13)." (Emphasis added)

This ruling has more recently been reaffirmed in *Ypsilanti Supervisor v State Tax Commission,* 386 Mich 343, 355-356; 192 NW2d 227 (1971),

> "One principle overrides all others in tax matters. '[T]he principle of equal treatment * * * is now recognized as being primary.' *In re Appeal of General Motors Corp,* 376 Mich 373, 379 (1965)."[21]

The United States Supreme Court has similarly held, applying the Equal Protection Clause of the United States Constitution to protect a state taxpayer's Federal Constitutional rights. In *Township of Hillsborough v Cromwell,* 326

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[21] While some of the Michigan decisions speak of "uniformity," it is clear that in this sense the rights protected by the Michigan Constitutional Uniformity Provision and the Equal Protection Clause are identical. (E.g., *Armco Steel Corp. v Department, supra,* 419 Mich at 591-592)

US 620, 623-624; 55 S Ct 445; 90 L Ed 358 (1945), the taxpayer complained it was intentionally singled out for taxation while other similarly situated were not. The Court held, at pp 623-624,

> *"The equal protection clause of the Fourteenth Amendment protects the individual from state action which selects him out for discriminatory treatment by subjecting him to taxes not imposed on others of the same class. The right is the right to equal treatment.* He may not complain if equality is achieved by increasing the same taxes of other members of the class to the level of his own. The constitutional requirement, however, is not satisfied if a State does not itself remove the discrimination, but imposes on him against whom the discrimination has been directed the burden of seeking an upward revision of the taxes of other members of the same class. *Sioux City Bridge Co v Dakota County,* 260 US 441, 445-447; *Iowa-Des Moines National Bank v Bennett,* 284 US 239, 247; *Cumberland Coal v Board of Revision,* 284 US 23, 28-29" (Emphasis added)

The Supreme Court in *Allegheny Pittsburgh Coal Co. v Webster County,* 488 US 336, 345-346; 109 S Ct 633; 102 L Ed 2d 688 (1988) recently unanimously reaffirmed this holding.

In the instant case, there is no question as to the Department's intentional and systematic administrative application of the PL 86-272 jurisdictional test to all other persons similarly situated. This precludes the Department, or the Court of Appeals, from applying a different more rigorous retroactive test solely to Gillette, resulting in Gillette paying single business taxes for which all

others similarly situated were intentionally and systematically not assessed.

G. WAS THE DEPARTMENT'S ADOPTION OF PL 86-272 AS AN ADMINISTRATIVE JURISDICTIONAL STANDARD FOR THE SBT INVALID?[22]

QUESTION:

WAS THE DEPARTMENT'S ADOPTION OF PL 86-272 AS AN ADMINISTRATIVE JURISDICTIONAL STANDARD FOR USE INADMINISTERING THE SBT ACT INVALID, ILLEGAL OR UNCONSTITUTIONAL AS SUCH AN ADMINISTRATIVE STANDARD?

(The Court of Appeals concluded PL 86-272 was inapplicable as federal law according to its term, but never recognized that the Department had adopted it by administrative policy as the jurisdictional standard it would use. The Court of Appeals correctly rejected the PL 86-272 test as applicable federal law, but did not rule as to whether the Department's adopting and uniformly applying it as an administratively [sic] policy was, for some reason, illegal.)

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[22] Even if it were improper, the uniformity guarantee would require the Department to nevertheless apply it to Gillette, if it had been applied to all others similarly situated. (See preceding discussion.)

DISCUSSION

1. The Department was Fulfilling its Delegated Duty to Adopt Such Standards and Administer the Tax.

The SBT Act is silent as to the test to be applied by the Department in imposing the SBT tax under the jurisdictional limitations mandated by the Michigan and United States Constitutions and federal law. The permissible limits on state taxation of "foreign" businesses under the federal constitutional due process, equal protection, privilege and immunities and commerce clauses have shifted over the years, and are in a constant state of flux. This is because such constitutional requirements are judicially announced, and new decisions are regularly handed down. In this context the Legislature in 1975 wisely left it to the Department to determine what jurisdictional test to administratively adopt, and to enforce, as a matter of administrative policy. In Section 104 of the Act (MCL 208.104; MSA 7.558(104)), as originally enacted and in force in 1980, the Legislature stated,

> "The tax imposed by this Act shall be administered by the Department. The Department shall prescribe forms for use by taxpayers and shall promulgate rules in conformity with this Act for the . . . ascertainment, assessment and collection of the tax imposed hereunder."[23]

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[23] The Legislature, in 1985, (1985 PA 139), replaced the administrative provision of the SBT Act with the Department of Revenue Act (MCL 105.1 *et seq*; MSA 7.657(1) *et seq*.) Section 3 of the Department of Revenue Act (MCL 205.3; MSA 7.657(3) now contains similar provisions.

The Department's PL 86-272 jurisdictional policy was issued by the Department *after* it had attempted in 1978 to use a standard similar to that retroactively ordered by the Court of Appeals below.[24] The Department intentionally selected a jurisdictional test clearly permissible under all applicable constitutional standards, and which was the same jurisdictional test used by other states which are members of the Multi State Compact, permitting multi state audits.[25] In so acting the Department was acting to administer the tax, to prescribe the forms and to adopt rules for the ascertainment of the tax. The Department, in other words, was fulfilling the duties the Legislature delegated. The Legislature, for over 13 years, acquiesced in the Department's adopted jurisdictional policy.[26] The Court of Appeals misunderstood.

2. The Court of Appeals Did Not Hold The Department's Adoption Of PL 86-272 As The SBT Jurisdictional Standard Was Invalid. Unconstitutional Or Even Improper.

QUESTION:

CAN THE DEPARTMENT CARRYING OUT ITS STATUTORY DELEGATED DUTY OF ADMINISTERING THE SBT ACT, ADOPT AND PUBLISH AS AN ADMINISTRATIVE POLICY A JURISDICTIONAL STANDARD TO BE UNIFORMLY APPLIED TO ALL POTENTIAL SBT

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[24] See discussion, *supra*, p 27, fn 19.

[25] See 1969 PA 343 (MCL 205.581 *et seq*; MSA 4.146(101) *et seq*)

[26] See discussion of The Doctrine of Legislative Acquiescence, *infra*, pp. 35-41.

TAXPAYERS, NOTWITHSTANDING THE FACT THAT A COURT, AT ANY GIVEN POINT IN TIME, AS A MATTER OF FEDERAL CONSTITUTIONAL LAW, COULD HAVE FASHIONED A DIFFERENT AND MORE AGGRESSIVE JURISDICTIONAL STANDARD?

DISCUSSION:

The Court of Appeals' Opinion appears to deal with PL 86-272 solely as a federal law, which it found inapplicable and then disregarded. The Court therefore never considered whether the Department could administratively adopt PL 86-272 as the jurisdictional standard the Department would uniformly apply. The Court of Appeals simply went off on an irrelevant tangent.

No one has cited and authority which would support the conclusion that the Department's administrative adoption of PL 86-272 as a jurisdictional standard was illegal, invalid, unconstitutional or improper. The Department certainly thought it was acting within its authority and power. Gillette has not contested the Department's power to administratively adopt PL 86-272 as its jurisdictional test.

3. It Would be Impossible for the Department to Apply a New and Different Test to All Potential SBT Taxpayers Retroactively 17 Years.

It would be impossible for the Department, now in 1993, to retroactively reach back 17, years and change its administrative jurisdictional standard to retroactively apply the standard adopted by the Court of Appeals.

Neither potential taxpayers nor Department records relating to activity in 1976, or 1977 or 1978, for example, are likely to still exist in recoverable form. Any effort by the Department now in 1993, to retroactively apply a different jurisdictional test to corporations soliciting sales in Michigan in 1976, or 1980, would be a meaningless sham. As was noted above in footnote 3, for example, the Department admitted it had not maintained any central record of potential SBT taxpayers with which it had contact, and was not even certain if individual files for such potential taxpayers existed.

H. THE COURT OF APPEALS SHOULD HAVE RECOGNIZED AND APPLIED THE DOCTRINE OF LEGISLATIVE ACQUIESCENCE.

QUESTION:

WHERE THE LEGISLATURE ENACTS A TAX, IS SILENT AS TO THE CONSTITUTIONAL JURISDICTIONAL TEST TO BE APPLIED, DELEGATES ITS ADMINISTRATION TO THE DEPARTMENT, AND ACQUIESCES FOR 13 YEARS IN THE DEPARTMENT'S ADMINISTRATIVE JURISDICTIONAL TEST, SHOULD A COURT APPLY THE DOCTRINE OF LEGISLATIVE ACQUIESCENCE AND APPLY THE LONGSTANDING ADMINISTRATIVE STANDARD?

DISCUSSION:

The SBT Act, enacted in 1975, effective 1976, has been amended many times since the Department adopted PL 86-272 as its administrative jurisdictional test in 1980. For example, it was amended in 1980, 1981, 1982, 1983, 1984,

1985, 1986, 1990, and 1991, sometimes several times in each year.[27] The doctrine of legislative acquiescence is well established in such circumstances.

The Department's administrative policy adopting PL 86-272 has been well known for approximately 13 years. During this period the Legislature has amended the Act over two dozen times. The Legislature is presumed to have been aware of the Department's adoption of the PL 86-272 administrative jurisdictional standard, and by its inaction on this subject while amending the Act repeatedly, is deemed to have consented and acquiesced to the Departmental administrative policy. The Court of Appeals, accordingly, "threw out" not only the standard consistently applied by the Department for many years, but also the position deemed intended by the Legislature.[28]

This Court recently applied the doctrine of legislative acquiescence when dealing with an administrative interpretation, there by the Department of Corrections of its enabling statute. In *Luttrell v Department of Corrections*, 421 Mich 93, 105.106; 365 NW2d 74 (1985) this Court, at p

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[27] See, e.g., 1980 PA 318; 1980 PA 468; 1981 PA 208; 1982 PA 216; 1982 PA 388; 1982 PA 393; 1982 PA 414; 1983 PA 84; 1983 PA 234; 1983 PA 235; 1984 PA 45; 1984 PA 360; 1984 PA 281; 1985 PA 139; 1985 PA 116; 1986 PA 136; 1986 PA 283; 1990 PA 70; 1990 PA 77; 1990 PA 128; 1990 PA 169; 1992 PA 69; 1992 PA 98; 1992 PA 159 and 1992 PA 170.

[28] See fn 3 *supra*, where the Department's Interrogatory Answer identified its administrative PL 86-272 policy, as the Department's understanding of the Legislature's intention.

105, citing *Margreta v Ambassador Steel Co.* (On Rehearing), 380 Mich 513; 158 NW2d 473 (1968), and *In re Clayton Estate*, 343 Mich 101; 72 NW2d 1 (1955), stated,

> "We consider next the doctrine of legislative acquiescence; legislative silence in the face of an agency's construction of a statute 'can only be construed as consent to the accuracy of that interpretation' [citations omitted]. This doctrine is based on the assumption that the Legislature is aware of prior interpretations of its Act, and that the construction given the statute by those charged with its execution is likely to be most accurate."

The Court in *Luttrell* concluded, at p 106, *"By its silence, the Legislature has acquiesced in the Department's consistent and longstanding construction of its powers."*[29] (Emphasis added)

The doctrine of legislative acquiescence was also recently applied by this Court with respect to the substantive jurisdiction of the Michigan Tax Tribunal under the Tax Tribunal Act (MCL 205.701 *et seq*; MSA 7.650(1) *et seq*). In *Wikman v Novi*, 413 Mich 617; 322 NW2d 103 (1982), this Court was determining whether the Tax Tribunal had jurisdiction over special assessment appeals. This Honorable Court's reasoning in *Wikman* is aptly captured in its *Luttrell* opinion, *supra*, where it stated at p 105,

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[29] See, *Grand Rapids School Employees Benefit Association v Board of Ed*, 95 Mich App 143, 150; 290 NW2d 105 (1980), where a similar result followed the State Board of Education's 7-point rule which had been in effect for four years, with one amendment to the relevant statute during that time.

> "This Court recently held that the Legislature acquiesced in the construction given a provision of the tax code by the Tax Tribunal. *Wikman* v Novi, 413 Mich 607, 637-638; 311 NW2d 103 (1982). The tax tribunal and the courts had consistently held that the tribunal had jurisdiction over special assessments levied pursuant to municipal charters. This was the result despite statutory language which confined the tribunal's jurisdiction to special assessments levied under 'property tax laws.' MCL 205.731; MSA 7.650(31). Because the Legislature amended the act twice without changing the jurisdictional provision, we reasoned that the Legislature agreed with this construction. Id., p 638."

Probably the leading case on point, and one amazingly close to the fact circumstances in the instant appeal, is *Magreta v Ambassador Steel Co., supra,* 380 Mich at 518-521. In that case the Supreme Court, on rehearing, reversed itself, castigating itself for earlier deciding the case on an issue that was not raised below, and was not considered an issue by the referee, the appeal board or the parties. This, of course, is precisely what the Court of Appeals did in this case. In *Magreta,* this Supreme Court cogently stated the basis for reconsideration and reversal of its earlier opinion, at pp 518-520. (We set out this Court's opinion in detail, as it involved a situation very similar to that presented by the instant appeal.)

> "In statutory construction we are bound to determine legislative intent. In the exercise of that duty we are obligated to utilize all the tools of the historic judicial method. We feel we over emphasized the grammatical analysis to the

prejudice of other well-recognized and long-established methods. In addition, *we underevaluated a wisely self-imposed limitation of the appellate process.*

We discussed first our departure from the usual appellate process. In our original decision, we said at p 701:

> 'Both parties to this appeal, it should be noted, proceeded on the assumption that the specific loss benefits specified in the schedule in Part 2, § 10 are subject to the maximum and minimum benefit limitations.'

Of course they did, and small wonder, for that 'assumption' had been part of the settled case law and administrative application of the statute since its inception. Simply put, we decided this case upon an issue that was not only never raised below, it was not even considered an issue before the referee, the appeal board or the court of appeals. We hardly need cite authority for the proposition that such an issue is not generally considered by any appellate court, and particularly by a court of ultimate review. We mention *Young v. Morrall* (1960), 359 Mich 180, 187, as expressive of the general principle.

The second basis which convinces us we did not properly apply the recognized tests of statutory construction was our failure to accord sufficient weight to the invariant interpretation accorded the statute by the commission legislatively delegated to administer it. Admittedly, our original decision gave to the statute an interpretation in conflict with that accorded it by the commission over the years.

In *Boyer-Campbell v Fry* (1935), 271 Mich 282, 296, we quoted with approval the following language of the United States Supreme Court in *United States v Moore*, (1887), 95 US 760, 763, (24 L ed 588, 589):

> 'The construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration and ought not to be overruled without cogent reasons.'

Third, we must recognize that we *did not consider the doctrine of legislative acquiescence* to have any bearing on the issue. We would not be understood to hold that standing alone this principle is controlling, yet *we must assume that the legislature was aware of the prior interpretation of the Act. Session after session the Act has been amended in some particular, but no specific amendment of the language here under consideration was made.* In support of this basic principle we refer to the language in *Re Clayton Estate* (1955), 343 Mich 101, 106, 107:

> *'The silence of the legislature* since 1922 to this Court's interpretation of its intent as expressed in the Fish case [*In Re Fish's Estate*, 219 Mich 369], *can only be construed as consent to the accuracy of that interpretation.'*

The same may be said to be applicable to the question here presented.

Last, we mention that the concept of a maximum and minimum upon compensation benefit has been a settled principle in our Act since its inception. . . . On due reflection, we are constrained to hold that if such an innovation in a

> statute is to be made it is properly to be made by the legislature." (Emphasis added)

The parallel to the instant situation is clear. The Michigan Department's PL 86-272 published jurisdictional position is longstanding, indeed 13 years old. It has been referenced in the Department's bulletins, its "Questions and Answers", its rulings, and in the decisions of the Tax Tribunal. In this proceeding both parties assumed that the Department's PL 86-272 jurisdictional standard was applicable. It was not an issue before the Tax Tribunal or the Court of Appeals, and it was not briefed by either party. Nevertheless the Court of Appeals, on its own initiative, apparently misunderstanding why the parties had not briefed this issue and assuming incorrectly that both believed PL 86-272 literally applicable, undertook to reverse this longstanding Departmental position. This longstanding Departmental practice had been relied upon for more than a decade by not only the Department but also by countless persons throughout the world considering business contacts with Michigan. The rationale and philosophy of this Court, as expressed so cogently in its *Magreta* opinion, should have been applied in the instant case.

It must also be noted that the Department's position was taken with the advice and the cooperation of the Attorney General's Office, which has facilitated enforcement of the PL 86-272 jurisdictional test over the past decade.[30] Potential SBT taxpayers, the Department and its

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[30] The Department, represented by the Attorney General's office, *did not oppose* Appellant Gillette's Motion for Rehearing, filed when the parties first became aware of the Court of

auditors, the Tax Tribunal, the Court of Claims, the Attorney General's Office, and the tax reporting services, all relied for many years on the Department's oft repeated position that PL 86-272 was the administrative test which would be applied to determine SBT jurisdiction. The Legislature is also assumed to have intended this as the proper test. This Court's rationale in its *Magreta* opinion fits this appeal perfectly. Even if its decision had been constitutionally permissible, the Court of Appeals should not have refused to permit consistent application of the Department's longstanding PL 86-272 jurisdictional policy.

I. THE COURT OF APPEALS SHOULD HAVE GIVEN ITS HOLDING PROSPECTIVE APPLICATION ONLY.

QUESTION:

SHOULD THE COURT OF APPEALS HAVE GIVEN ITS RULING INVALIDATING THE DEPARTMENT'S LONGSTANDING SEVENTEEN YEAR APPLICATION OF PL 86-272 AS ITS JURISDICTIONAL STANDARD PROSPECTIVE EFFECT ONLY, TO AVOID RETROACTIVELY FOR SEVENTEEN YEARS TREATING GILLETTE DIFFERENTLY FROM ALL OTHER SIMILARLY SITUATED TAXPAYERS, IN VIOLATION OF THE FEDERAL AND MICHIGAN CONSTITUTIONAL GUARANTEES?

Appeal's refusal to apply the Department's longstanding PL 86-272 SBT jurisdictional test.

DISCUSSION:

The Court of Appeals, even if its conclusion that the Department should not for 13 years have uniformly applied the PL 86-272 jurisdictional standard were sound, should have given that decision prospective effect only, applying for the years at issue (1976-1981) to Gillette the same test the Department had uniformly applied to all similarly situated potential taxpayers. This approach would avoid the constitutional uniformity and equal protection issues, briefed above, would recognize the doctrine of legislative acquiescence and would treat Gillette as the Department admits it uniformly treated all others similarly situated. It would also have required the Court to address the issues raised on appeal and to decide whether Gillette was subject to SBT jurisdiction under the administratively adopted PL 86-272 jurisdictional standard. The Court of Appeals should be directed to do this on remand.

Many decisions of this Court have espoused the prospective application doctrine where an appellate decision would otherwise work undeserved hardship or impose a considerable administrative burden. For example, in reviewing and rejecting certain property tax equalization practices and procedures of the State Tax Commission, this Court, in *Washtenaw County v State Tax Commission*, 422 Mich 346, 378-379; 373 NW2d 697 (1985) gave its holding prospective application only, stating at pp 378-379, *inter alia*,

> In this case, the local governments have already collected and spent the 1982 tax levies in question; state aid, such as the school fund and revenue sharing, has already been allocated on

> the basis of those figures. *It would represent a considerable administrative burden to require recalculation of the 1982 equalized valuations, especially in light of the fact that no method currently exists for taking the creative financing effect into account.*[31] (Emphasis added)

In the instant case, the policy and practice of another branch of the Department of Treasury, is at issue. (The Department's administrative standard has not been found unconstitutional or even illegal, however, but has merely been replaced by the Court of Appeals, on its own initiative, with a different jurisdictional standard.) Here, too, it would impose an impossible administrative burden for the Department to be directed to go back to 1976 and reconsider each potential taxpayer with respect to whom it applied the PL 86-272 jurisdictional test. There are simply not adequate records.[32] Alternatively, from the point of view of the prospective taxpayers involved, of those which could be found some would discover that their reliance on the Department's longstanding published PL 86-272 jurisdictional standard have proven fatal. They would be retroactively subjected to Michigan taxes, and interest, for up to 17 years. They could be

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[31] In *Washtenaw County,* this Court also cited *Robinson v Cahil,* 62 NJ 473; 303 A2d 273 (1973), *cert den* 414 US 976 (1973), in which the New Jersey Supreme Court, in applying a prospective remedy when it declared an education financing scheme unconstitutional, stated:

> The present system being unconstitutional, we come to the subject of remedies. We agree with the trial court that relief must be prospective. The judiciary cannot unravel the fiscal skein.

[32] *See* fn 3 *supra.*

devastated, ruined, driven into bankruptcy. And all for no fault of their own, indeed for relying upon the Department's published jurisdictional standard, in which the Legislature had long acquiesced. As in *Washtenaw* any ordered change in administrative practice should have been effective prospectively only.

In *Tebo v Havlik, et al,* 418 Mich 350, 360-361; 343 NW2d 181 (1984), this Court, dealing with statutory instruction of the Dram Shop Act, discussing prospective application of its construction, stated,

> . . . this Court has adopted a flexible approach.
>
> > "It is evident that there is no single rule of thumb which can be used to accomplish the maxim of justice in each varying set of circumstances. Involvement of vested property rights, the magnitude of the impact of decision on public bodies taken without warning or *a showing of substantial reliance on the old rule may influence the result.*"
>
> *Williams v Detroit,* 364 Mich 231, 265-266; 111 NW2d 1 (1961) (opinion of Justice Edwards in which Justices Talbot Smith, T. M. Cavanaugh and Souris concurred).
>
> The benefit of flexibility in opinion application is evident. If a court were absolutely bound by the traditional rule of retroactive application, it would be severely hampered in its ability to make needed changes in the law because of the chaos that could result in regard to prior enforcement under the law. *Placek v City of Sterling Heights,* 405 Mich 638, 665; 275 NW2d 511 (1979).

That Gillette, and all of the other potential SBT taxpayers had relied upon the Department's PL 86-272 jurisdictional standard since 1980 is obvious.[33]

In *People v Smith*, 405 Mich 418, 432-433; 275 NW2d 466 (1979) this Court, quoted with approval from *Lemon v Kurtzman*, 411 US 192; 93 S Ct 1463; 36 L Ed 2d 151 (1973),

> However appealing the logic of *Norton*[34] may have been in the abstract, its abandonment reflected our recognition that statutory or even judge-made *rules of law are hard facts on which people must rely in making decisions and in shaping their conduct. This fact of legal life underpins our modern decisions recognizing a doctrine of nonretroactivity.* Appellants offer no persuasive reason for confining the modern approach to those

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[33] While the prospectivity opinions of this Court frequently talk of the inadvisability of denying the successful party in the appeal the fruits of its success, thereby discouraging others from ever challenging existing rules or opinions, this is *not* a consideration in this appeal. *Neither* Gillette *nor* the Department asked the Court of Appeals to declare the longstanding PL 86-272 standard retroactively invalid back 17 years.

[34] In *Norton v Shelby County*, 118 US 425, 442; 6 S Ct 1121; 30 L Ed 178 (1886), the U.S. Supreme Court declared that "[a]n unconstitutional statute * * * confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed." In the instant case, the Court of Appeals did not find the Department's PL 86-272 jurisdictional standard unconstitutional, but rather replaced it with another the Court mistakenly apparently thought more appropriate. *Norton*, accordingly would not have been applicable in any event.

> constitutional cases involving criminal procedure or municipal bonds, and we ourselves perceive none.[35] (Emphasis added)

Accordingly, even if its decision were correct, and PL 86-272 were for some reason not a legal jurisdictional standard as adopted by the Department in the performance of its statutorily delegated duty to administer the Single Business Tax Act, nevertheless to avoid unconstitutionality, an impossible administrative burden and an unquestionably unfair and unexpected tax burden, the Court of Appeals' holding should have been given prospective application only.

By neglecting to apply its holding prospectively only, the Court of Appeals ordered the Department to take action when the Department would probably have been prohibited from taking on its own initiative, the constitutional equal protection and uniformity issues aside.

In 1 Cooper, *State Administrative Law*, p 267, the author states:

> "There is growing recognition among the state courts of *the healthy principle that a person who relies in good faith on an agency rule should be held harmless from loss if that rule is later held invalid, or is amended.*

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[35] *See also Shavers v Attorney General*, 402 Mich 554, 608-609; 267 NW2d 72 (1978) and *Penn Mutual Life Insurance Co v Dept of Licensing and Regulation*, 162 Mich App 123, 132-133; 412 NW2d 668 (1987), *lv den* 429 Mich 871 (1987).

Subsequently, Professor Cooper states, at 513,

> "Disagreements do arise in cases where some time after a ruling has been made, the tax commission changes its construction of the statute and seeks to impose its new interpretation retroactively with respect to years intervening between the date of the original ruling and the date of the new one. On this question, the clear trend in the state court decisions is to hold that retroactive application will not be permitted."[36]

This "trend" is reflected *In Re D'Amico Estate*, 435 Mich 551; 460 NW2d 198 (1990), where this Court dealt with the Department's attempt to retroactively change its first contemporaneous construction of Section 34 of the Lottery Act, which made lottery winnings exempt from inheritance tax.[37] The Court concluded the Department could change its position, but only prospectively. The Court held, at p 564,

> "The Department of Treasury should be held to be bound by the first, contemporaneous construction by" the state, at least with regard to the estates of persons who purchased lottery tickets before September 14, 1983, when the

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[36] Section 3, pp 513-518, of Cooper's discussion in the treatise, State Administrative Law, is attached as ***Exhibit F.***

[37] The Court noted,

'There not having been a ruling by this court establishing the law in Michigan, *the Department's eleven-year practice of exempting lottery proceeds from inheritance tax on the basis of a ruling by the Attorney General takes on, in our opinion, decisive significance.*" (Emphasis added)

> Department advised inheritance tax field examiners of a 'new development.' "

It has always been Michigan law, as was noted by the Court in the *D'Amico Estate* case, 435 Mich 551, at pp 559-560,

> "This Court has held that 'the construction placed upon a statute by the agency legislatively chosen to administer it is entitled to great weight.' *Davis v River Rouge Bd of Ed*, 406 Mich 486, 490; 280 NW2d 453 (1979).
>
> A leading treatise on statutory construction states:
>
> 'Interpretations and application of regulations by officers, administrative agencies, departmental heads and others officially charged with the duty of administering and enforcing a statute have great weight in determining the operation of a statute. *The greatest weight attaches to an administrative interpretation in favor of parties who have reasonably relied upon it.* (2A Sands, Sutherland Statutory Construction (4th Ed), §49.05, p 362. (Emphasis added]
>
> 'One of the soundest reasons sustaining contemporaneous interpretations of long standing is the fact that *the public has relied on the interpretation* . . . While the principle here is not strictly that of estoppel running against the government there is some analogy to that principle when the interpretation has been made by a government agency or officer.' [*Id.*, §49.07, p 394. Emphasis added.]"

The Supreme Court concluded the Department was bound by its first contemporaneous construction until

that point in time when it gave notice of a different construction.

The Department's PL 86-272 jurisdictional standard was not held invalid. The Department's PL 86-272 test when adopted was a reasonable test, particularly given the possibility of inter-state tax compact audits and recognizing the many cases available as guides to the application of the PL 86-272 nexus standard. The Court of Appeals, constitutional arguments aside, was incorrect in finding the Department's administratively adopted PL 86-272 jurisdictional test retroactively invalid. If the Department can be ordered to abandon the administrative jurisdictional standard it chose to apply, it should be ordered to do so prospectively only.

SUMMARY OF ARGUMENT

The parties briefed the applicability to Gillette's 1976-1981 Michigan sales activities of the PL 86-272 SBT jurisdictional standard adopted by the Department in 1980, retroactive to 1976. The Department admitted it had applied the PL 86-272 test uniformly to all similarly situated potential taxpayers (supra, pp 9-13). It did this as an administrative jurisdictional standard, not because it believed PL 86-272, as federal law, was applicable by its terms. It knew the SBT Act was not an income tax, and that PL 86-272 was therefore not literally applicable. (supra, pp 2-6, 9, 24-28). The Court of Appeals, ignoring the issue briefed, without any warning to the parties at oral argument, held PL 86-272 was not applicable as federal law by its terms, and proceeded to fashion a different "nexus" jurisdictional test based on a 1992 U.S.

Supreme Court decision, which it required be applied 17 years retroactively solely to Gillette, instead of the standard the Department had uniformly applied to all others. The Appellant's Motion for Rehearing, to which the Department filed no answer, was denied without comment (supra, pp 1-13 and ***Exhibit A***).

The Court of Appeals' perception of the controlling issue, the applicability of PL 86-272 as federal law by its terms, was wrong. The Department did not believe it applicable by its terms, but had adopted it and for 15 years uniformly applied it as an administrative standard (see supra, pp 1-13). The Court of Appeals' incorrect conclusion was not required by its simultaneously issued opinion in *Guardian Industries v Department, supra.* (supra, pp 13-15). Actions ordered by the Court of Appeals are subject to the same constitutional uniformity and equal protection restrictions, as the same actions if taken by authority of either the executive or legislative branches of government (supra, pp 15-18). The 17 year retroactive application of a new less favorable tax jurisdiction standard to a single taxpayer, where all others had been uniformly tested by a different more favorable standard, would not be a constitutionally permissible action for the Department (supra, pp 18-21 or the Legislature (supra, pp 21-24). The Courts have long held where there is a conflict between the uniform and equal application of a tax and its correct administration, uniform and equal application are of paramount importance (supra, pp 28-31). Further, here the Department's longstanding administratively adopted and uniformly applied SBT jurisdictional standard had not even been held unconstitutional, invalid or even improper (supra, pp 32-34). The adoption

of the PL 86-272 administrative standard was within the powers legislatively delegated to the Department to administer the tax, the SBT Act being silent as to any such jurisdictional standard (supra, pp 32-34). It would have been impossible for the Department to, retroactively for 17 years, apply the same new jurisdictional standard to all similarly situated potential taxpayers (supra, pp 34-35). Because the Legislature, which had amended the SBT Act over 24 times after the PL 86-272 test had been administratively adopted and published, had not changed this standard, it is deemed to have approved it under the doctrine of legislative acquiescence (supra, pp 35-41). Lastly, in circumstances such as these, the Legislature if it had grounds for invalidating the Department's administrative jurisdictional standard, should have done so prospectively only (supra, pp 41-47).

RELIEF REQUESTED

WHEREFORE, Petitioner-Appellant, The Gillette Company, respectfully requests this Honorable Supreme Court, pursuant to MCR 7.302(F)(1), to grant leave to appeal this matter and in connection therewith to order proceedings and such relief as is appropriate in the circumstances, including, but not limited to, an order peremptorily reversing the decision of the Court of Appeals and remanding to that Court of Appeals ordering it to recognize the Department's longstanding uniformly applied application of PL 86-272 as the SBT jurisdictional test and, based on the record and the arguments and briefs of the parties, determine whether Respondent Appellee, the Department of Treasury, had borne its burden of proving that, under PL 86-272 test

administratively uniformly applied by the Department, Gillette was subject to Michigan's SBT jurisdiction for each of the tax years 1976 through 1981.

Respectfully submitted,

MILLER, CANFIELD PADDOCK
AND STONE
Samuel J. McKim, III (P-17480)
Robert F. Rhoades (P-28160)
Joanne B. Faycurry (P-40993)

By /s/ Samuel J. McKim, III
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Dated: June 8, 1993

APPENDIX E

Michigan Supreme Court
Lansing, Michigan

Order

Entered: April 19, 1994

Michael F. Cavanagh
Chief Justice

Clarles L. Levin
James H. Brickley
Patricia J. Boyle
Dorothy Comstock Riley
Robert P. Griffin
Conrad L. Mallett, Jr.
Associate Justices

96793

THE GILLETTE COMPANY,

Plaintiff-Appellant,

v

MICHIGAN DEPARTMENT OF TREASURY,

Defendant-Appellee.

SC: 96793
COA: 118660
LC: 073916
090676
090677

On order of the Court, the application for leave to appeal is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

Mallett, Jr., J., would grant leave to appeal.

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[seal]

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

April 19, 1994 /s/ Corbin R. Davis

APPENDIX F

STATE OF MICHIGAN

IN THE SUPREME COURT

THE GILLETTE COMPANY,

Petitioner-Appellant,

vs

MICHIGAN DEPARTMENT OF TREASURY,

Respondent-Appellee.

_____/

Supreme Court No. 96793

Court of Appeals No. 118660

MTT Docket Nos. 73916, 90676, 90677

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_____/

MOTION FOR RECONSIDERATION

NOW COMES Petitioner-Appellant, The Gillette Company, by and through its legal counsel, Miller, Canfield, Paddock and Stone, and in support of its Motion For Reconsideration of this Supreme Courts' denial of leave to appeal in this cause, pursuant to MCR 7.313(E), respectfully represents unto this Honorable Supreme Court the following:

1. Appellant's Application for Leave to Appeal in this cause was denied on *April 19, 1994*, for the stated reason that this Court was "not persuaded that the questions presented should be reviewed by this Court". Justice Mallett, Jr., would have granted leave to appeal. Supreme Court's April 19, 1994, Order is attached hereto as ***Appendix A.***

2. In this case, the Court of Appeals used *sua sponte*, a test in its Opinion which it deemed dispositive, which such test was not raised below, was not relied upon by the Tax Tribunal, and which was not briefed or argued to the Court of Appeals, because the parties knew the test could not be constitutionally applied. The Court of Appeals did not know this, and refused to permit the Appellant to demonstrate that the Court's ill informed adoption *sua sponte* of the "surprise" test was unquestionably unconstitutional. Court of Appeals' Opinion is attached hereto as ***Appendix B.***

3. This Honorable Court's denial of leave to appeal, coupled with the Court of Appeals' surprise *sua sponte* injection in its Opinion of a new and dispositive issue, without permitting Appellant to address or to assert its defenses to the surprise issue, deprives Appellant of its

right to a fair hearing and an opportunity to defend itself against the State's assertion of taxation jurisdiction, in violation of fundamental procedural Due Process rights protected by the United States and Michigan Constitutions.

4. The Appellee Department of Treasury (the "Department") knowingly and intentional [sic] adopted PL 86-272 (15 USC 381), which is literally applicable only to income taxes, as an administrative jurisdictional test to determine when, and upon whom, to assert jurisdiction to impose the Single Business Tax, enacted in 1976 (MCL 208.1 *et seq;* MSA 7.558.1 *et seq*) (the "SBT" or the "SBTA"), being a value added tax to which PL 86-272 was not literally applicable.

5. The injection, for the first time, by the Court of Appeals *sua sponte* in its Opinion in this case, of what it believed to be the dispositive issue, without any opportunity being accorded the parties to address this issue in brief or even oral argument, is so fundamentally unfair as to deprive Appellant of its procedural Due Process rights, requiring some hearing on these issues, before some forum, to permit Appellant to be heard as to the applicable defenses and to have its day in court.

6. The *sua sponte* "issue" injected without notice, or benefit of briefs or argument, in the Court of Appeals' Opinion, was a jurisdictional test knowingly and intentionally waived by the Department, and therefore not briefed by the Appellant, because the Department could not constitutionally apply such jurisdictional test, without depriving Appellant of its constitutionally protected rights to equal protection and to uniform treatment.

7. For more than a decade prior to the Opinion of the Court of Appeals in this cause, the Department uniformly and consistently applied PL 86-272 in determining as to whom it could assert SBTA jurisdiction to tax.

8. The Department applied PL 86-272 to Appellant, and all others similarly situated, during all relevant years, including but not limited to the years here at issue 1976-1981, and to subsequent years not here at issue 1982-1992.

9. At trial in the Michigan Tax Tribunal below, as in discovery and in all pleadings and briefs in the Tribunal, the only SBTA jurisdictional test asserted or briefed by the Department, was the PL 86-272 administrative test it uniformly applied.

10. At the Court of appeals, all briefs, supplemental briefs and oral argument by both parties, were directed to the PL 86-272 jurisdictional test administratively adopted and uniformly applied by the Department during all relevant years and up to 1992.

11. At no time did the Court of Appeals inform the parties to this appeal that it was on its own initiative and without providing the parties an opportunity to be heard, discarding and ignoring the jurisdictional test used by the Department, relied upon by all taxpayers in conducting their Michigan business activities, and relied upon by the Tribunal below, and was instead considering a different jurisdictional test which the Court of Appeals raised *sua sponte*, and relied upon for this first time in its Opinion.

12. The Department believed it had the power and authority to administratively adopt and uniformly apply PL 86-272 as the test to determine jurisdiction to assert the SBTA tax on businesses located elsewhere which engaged in Michigan business activities in interstate commerce.

13. The Department could not assert a different SBT jurisdictional test, such as that adopted *sua sponte* by the Court of Appeals in this appeal, against Appellant, while uniformly asserting the PL 86-272 administrative jurisdictional test on all similarly situated potential SBT taxpayers, without violating one or more of, the Michigan Constitutional Uniformity Guarantee (Const 1963, art 9, § 3), the Michigan Constitutional Equal Protection Guarantee (Const 1963, art 1, § 2) and/or the United States Constitutional Equal Protection Guarantee (US Const Am XIV). This is precisely why the "issue" raised *sua sponte* by the Court of Appeals was not raised by the parties or relied upon by the Tax Tribunal. It was a non-issue.

14. Appellant has asserted in its Motion for Rehearing in the Court of Appeals, and in its application for leave to appeal to this Supreme Court, arguments, as to which it has not yet been heard by either Court, that the *sua sponte* adoption of a different SBT jurisdictional test by the Court of Appeals Opinion violates not only Appellant's procedural Due Process rights, but also Appellant's substantive Due Process rights and other State and Federal Constitutional rights. Without an opportunity to address and defend against the jurisdictional test imposed *sua sponte* by the Court of Appeals, and not yet reviewed by this Honorable Supreme Court, Appellant is unconstitutionally denied a plain, speedy and efficient

remedy in this State's courts, indeed it is denied even the opportunity of arguing for a remedy.

15. That for the years at issue, the Department after its publication of its "Single Business Tax Bulletin 1980-1 – Jurisdictional Standards," did not assert the jurisdictional test adopted by the Court of Appeals *sua sponte* in its Opinion, to any other potential taxpayers.

16. That this Honorable Supreme Court can take judicial notice of the fact that the Department is now advising potential SBTA taxpayers who have not filed SBT returns for prior years, that the test adopted *sua sponte* by the Court of Appeals Opinion in this Appeal will be applied back to the years 1989 and 1990, and such test is *not* being retroactively applied to potential SBT taxpayers, other than Appellant, for the years at issue in this appeal, although because no returns were filed, the statute of limitations would permit this.

WHEREFORE, and for the reasons more fully set forth in the attached Brief in Support of Motion for Reconsideration, Petitioner-Appellant, The Gillette Company, respectfully requests that this Honorable Supreme Court grant the instant Motion for Reconsideration, and issue its order either (a) granting leave to appeal in this matter, or (b) remanding to the Court of Appeals with instructions to permit the parties to brief the new jurisdictional issue raised *sua sponte* by the Court of Appeals

in its Opinion, and then to reconsider its Opinion in this cause.

Respectfully submitted,

MILLER, CANFIELD, PADDOCK
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Dated: May 10, 1994

STATE OF MICHIGAN

IN THE SUPREME COURT

THE GILLETTE COMPANY,
Petitioner-Appellant,

vs.

MICHIGAN DEPARTMENT OF TREASURY,
Respondent-Appellee.

Supreme Court No. 96793

Court of Appeals No. 118660
MTT Docket Nos. 73916, 90676, 90677

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BRIEF IN SUPPORT OF MOTION FOR RECONSIDERATION

NOW COMES Petitioner-Appellant, The Gillette Company, and in support of its Motion for Reconsideration Under MCR 7.313(E), filed simultaneously herewith, respectfully represents unto this Honorable Supreme Court the following:

SUMMARY FACTUAL AND ISSUE BACKGROUND

This appeal involves, *inter alia*, a *flagrant denial of Appellant's State and Federal procedural Due Access rights* by the Court of Appeals. The Court of Appeals, admitting the issue had not been briefed, and without any notice to the parties, adopted *sua sponte in its Opinion*, a new and determinative taxing jurisdiction test, different from that argued by the parties and applied by the Tax Tribunal below. The Court of Appeals did not permit briefs or argument on the new issue it *sua sponte* injected, and denied Appellant's Motion for Rehearing.

The new test applied *sua sponte* by the Court of Appeals could not be constitutionally applied. Appellant, however, was not given any opportunity to enter argument on this issue. Appellant was therefore denied its "day in court" and its opportunity to argue available defenses to the issue raised for the first time in the Court of Appeals' Opinion. The general factual background for this Motion for Reconsideration is set forth next.

The Michigan Single Business Tax (MCL 308.1, et seq; MSA 7.558.1, et seq) ("SBT Act" of the "SBTA"), a modified value added tax, became effective in 1976. This was and is the only value added type tax in the United States. Respondent-Appellee, the Michigan Department of Treasury ("Department") recognized from the outset, as did the courts and legal commentators, that the SBT was *not* an income tax.[1] The Department, accordingly, had to determine what jurisdictional test to use in administering

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[1] See Application for Leave to Appeal, pp 24-28.

the SBTA. Because it was unlike any tax in existence, there was no precedent for the proper jurisdictional test.

The Department, shortly after the SBT's enactment, decided to administratively adopt the PL 86-272 jurisdictional test[2] to determine when it would assert jurisdiction under the new and different SBTA value added tax.[3] The Department knew, and stated, that PL 86-272 did not literally apply, because the SBTA was not an income tax.[4] The PL 86-272 test was administratively adopted by the Department because it wished to use this test, not because it had to. The Department has admitted in this case that it uniformly applied the PL 86-272 administrative test to all potential taxpayers during the years at issue and indeed did so for over 15 years until the 1993 Court of Appeals' decision in this case.[5]

When the Department asserted SBTA jurisdiction over Appellant in this case, for tax years 1976-1981, it did

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[2] Congress had earlier enacted Public Law 86-272 (15 USC 381) (Exhibit C to Application for Leave to Appeal) to restrict the states from exercising income tax jurisdiction over interstate businesses which had only solicited sales in a state, accepting and filling orders from outside that state. But for PL 86-272, the states could constitutionally have imposed an income tax on many such businesses. This why Congress had acted. Michigan, from 1967 through 1975 had imposed a corporate income tax, and was restricted by the PL 86-272 jurisdictional test (MCL 206.61; MSA 7.557(171), now repealed). The Department was, accordingly, familiar with PL 86-272.

[3] See e.g., SBT Bulletin 1980-1, Exhibit D to Application for Leave to Appeal and Revenue Administrative Bulletin 89-46, Exhibit E to Application for Leave to Appeal.

[4] See, e.g., Exhibit R-6; 1978-3 SBT Jurisdictional Bulletin.

[5] See Application for Leave to Appeal pp 9-13.

so under its administratively adopted and uniformly applied PL 86-272 test. The Appellant, verifying that the Department uniformly applied PL 86-272, contested the SBT jurisdictional assertions by arguing that, under the Department's uniformly applied PL 86-272 test, Appellant should not be deemed taxable in Michigan. The Appellant, accordingly, knowing that it was constitutionally entitled to equal and uniform tax treatment with all others, offered all available factual and legal defenses related to the PL 86-272 jurisdictional test applied by the Department. Appellant did not attempt to defend against other jurisdictional tests the Department did not and could not, constitutionally raise.

The Michigan Tax Tribunal decided this matter after a lengthy trial, based on the PL 86-272 jurisdictional test. No other test was suggested by the Department. The parties briefed this matter on appeal, and entered argument based solely on the PL 86-272 test. Questions from the Court of Appeals, bench during oral argument related solely to the PL 86-272 jurisdictional test. Supplemental briefs were filed based on the PL 86-272 test. No other test was suggested by the Department on appeal.

The Court of Appeals issued its opinion concluding, on what it mistakenly thought was an issue of first impression,[6] that the SBTA was a value added tax and not an income tax and that PL 86-272 was inapplicable to other than income taxes. It accordingly fashioned its own test as to what SBT jurisdiction Michigan could constitutionally assert. The Court of Appeals noted these issues

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[6] Opinion, pp 1-2 and fn 1 and 2.

had not been briefed.[7] The Court found jurisdiction existed, avoided all the jurisdictional PL 86-272 factual and legal issues raised by the parties in the trial court and in the Court of Appeals, and affirmed the Tax Tribunal below, albeit on the new and different jurisdictional test it *sua sponte* adopted, which had never been addressed by the parties in the Tribunal, and which the Court of Appeals did not give the parties an opportunity to address on appeal.

Appellant moved for rehearing, arguing that the Court's adoption *sua sponte* of a different jurisdictional test raised several critical issues which had not theretofore been relevant to the appeal, and which Appellant had not yet had the opportunity to brief or argue. Among these issues was the fact that the Court of Appeals'

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[7] The Court of Appeals neglected to note that Appellant *had* explained in its Brief why the issue had not been briefed. Appellant stated, at p 49,

> "This Court of Appeals need not consider whether PL 86-272 is the correct test of taxable status in applying the single business tax. PL 86-272 must be applied. To apply a less advantageous nexus text to Gillette than that which was by the Department's own admission uniformly it [sic] applied to all others, would deprive Gillette of equal protection of the law. See *IBM v United States*, 343 Fed 2d 914 (Court of Claims 1965); *MCI Telecommunications, Inc v Department of Treasury*, 136 Mich App 28; 355 NW2d 627 (1984) *lv den* 22 Mich 883 (1985) and *Armco Steel v Department of Treasury*, 419 Mich 582; 358 NW2d 839 (1984)."

adoption *sua sponte* of a new and different SBTA jurisdictional test violate Appellant's constitutional rights in several respects. The Motion for Rehearing was denied without comment.

Appellant's Application for Leave to Appeal to this Supreme Court was denied because this Court was not persuaded that the questions presented should be reviewed by this Court. (Justice Mallet would have granted leave to appeal.)

Appellant now moves for reconsideration on the grounds set forth below. Appellant emphasizes that if no Michigan court will accord it an opportunity to assert its defenses to the new jurisdictional approach adopted *sua sponte* by the Court of Appeals, Appellant will have been denied procedural Due Process. The Court of Appeals' procedure was fundamentally unfair to Appellant. The Court of Appeals relied upon a jurisdictional test Appellant had not been permitted to contest or argue against, and deprived Appellant of more than a million dollars without a fair hearing on the new issue raised for the first time, *sua sponte* by the Court of Appeals in its Opinion.

Appellant respectfully asks for its "day in court," for the opportunity to argue in some judicial forum that the new test, applied *sua sponte* by the Court of Appeals, cannot be constitutionally applied. This Honorable Supreme Court could determine to hear this appeal or it could remand to the Court of Appeals with instruction that supplemental briefs and argument as to whether the Court of Appeals' SBTA jurisdictional test could be constitutionally applied to Appellant, retroactively to 1976. Either approach would accord Appellant the opportunity

guaranteed as a matter of constitutional Due Process to a hearing on these issues, and the opportunity to be heard as to its defenses.

1. **The Jurisdictional Test on Which the Court of Appeals Decided this Appeal was a *Total Surprise*, Never Having Been Asserted or Briefed by Either Party In Over Ten Years of Litigation, and Never Mentioned By the Court of Appeals Until Seen in Its Opinion.**

The Court of Appeals decided the appeal, *sua sponte*, on a new jurisdictional test issue which (a) had *not* been raised at the trial level by either party, (b) was *not* raised on appeal in the statements of issues on appeal of either party, (c) was *not* briefed by either party and (d) was *not* argued by either party. The Court of Appeals did this *without any notice* to Appellant (or to either party) that it believed these issues relevant, *without offering any opportunity* to Appellant (or either party) to present "every available defense" (or any defense at all) to the new issue raised *sua sponte* by the Court of Appeals, *without permitting supplemental briefs on this issue, without remand* for hearing on the new issue, and *without granting* Appellant's Motion for Rehearing.

2. **Appellant Was Denied Any Opportunity to Brief or Defend Against the Court of Appeals *sua sponte* Adoption of the New Jurisdictional Test.**

In this case, Appellant, nominally the Plaintiff in this matter, was defending against SBTA tax assessments by

the Department for the years 1976-1981. The Department had the burden of proving it had jurisdiction to assess Appellant for SBT taxes.[8] The Department based its jurisdictional assertion on the PL 86-272 test it had administratively adopted. Accordingly, the Department attempted to meet its burden by showing that Appellant's Michigan activities exceeded those permitted by PL 86-272. Appellant necessarily joined issue with the Department on whether Appellant's activities exceeded those permitted under PL 86-272.

Never did the Department suggest at or after trial it was basing its assessment on any jurisdictional test other than PL 86-272 which it uniformly applied. Appellant, accordingly, had no opportunity to brief or argue why the Department should not be permitted to apply any other test, for the Department had not attempted to apply any other test. Appellant had no reason whatsoever to anticipate a totally new and different jurisdictional test being raised, *sua sponte*, by the Court of Appeals in its Opinion. The surprise adoption of a different jurisdictional test by the Court of Appeals in its Opinion, *sua sponte*, without any forewarning whatsoever, effectively resulted in the Court's holding against Appellant on an issue against which Appellant was denied the opportunity to defend.

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[8] *Consumers Power Co v Corp and Securities Comm*, 326 Mich 643, 651; 40 NW2d 756 (1950); *Aver v Dept of Treasury*, 137 Mich App 353, 358; 357 NW2d 696 (1984).

3. Appellant and the Department Both Knew That the Department Could Not Constitutionally Apply the Jurisdictional Test Applied, *Sua Sponte*, by the Court of Appeals.

Both Appellant and Appellee knew, and agreed, that the longstanding jurisdictional test uniformly applied by the Department under the SBT was that enunciated in PL 86-272. Both Appellant and Appellee knew this was the test uniformly applied to all similarly situated taxpayers by the Department, and that the Department could not constitutionally apply any different test to Appellant. The constitutional guarantees of uniformity and equal protection require the Department to deal with similarly situated taxpayers uniformly.[9] Appellant was entitled to have the same PL 86-272 test applied to it which the Department had repeatedly admitted it had uniformly applied to all others. Accordingly, the parties correctly concluded no other jurisdictional test was relevant. The Court of Appeals, because it would not listen, was apparently

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[9] A state agency is constitutionally prohibited, under the Federal Equal Protection Clause, from intentionally, arbitrarily and systematically discriminating against any taxpayer in the course of the administration of the tax laws. (*Sunday Lake Iron v Wakefield Twp*, 247 US 350; 38 S Ct 495; 62 L Ed 1154 (1918).) This test was recently reiterated in *MCI Telecommunications Co v Department of Treasury*, 136 Mich App 28; 355 NW2d 627 (1984), *lv den* 422 Mich 883 (1985), where the Department was warned that it could not apply the Use Tax Act one way to MCI, and assuming the taxpayer's circumstances were the same, differently to AT&T. The rule of "Unconstitutional Administrative Discretion" is accordingly well established. (See discussion in Leave to Appeal pp 18-21)

unaware of this history of uniform application of the *administrative* PL 86-272 test.

4. Appellee-Department Had Effectively Waived the Right to Assert Any Jurisdictional Test Against Appellant Other Than PL 86-272.

Because the Department could not constitutionally have applied any other jurisdictional test to Appellant, Appellant did not attempt to brief or argue any other jurisdictional test. By intentionally and knowingly failing to assert any other jurisdictional test at trial and by failing to assert any other test before the Court of Appeals, the Department must be deemed to have purposely waived this issue. And the Appellant proceeded at trial and on appeal in reliance upon this waiver.

5. The Court of Appeals Misunderstood the Circumstances and, *Sua Sponte*, Mistakenly Adopted a New and Unconstitutional Test.

Unfortunately, the Court of Appeals found what it mistakenly thought was an issue of first impression.[10]

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[10] The Court of Appeals reference to the remand by the Supreme Court *Amway Corp v Dept of Treasury*, 433 Mich 908; 448 NW2d 348 (1989), highlights the Court of Appeals, misunderstanding of the issues in this appeal. *Amway* mentions the issue of what test was to be imposed under SBTA Section 42 (MCL 208.42; MSA 7.558(42)) to determine whether other states could constitutionally impose taxes on a multistate taxpayer for Michigan apportionment formula sales factor calculation purposes. The instant case involves the issue of whether Appellant was taxable in Michigan under the administrative jurisdictional test

Noting the issue had not been briefed, and apparently mistakenly believing this was an oversight of the parties, it offered no opportunity for brief or comment. Accordingly, the Court of Appeals new and different jurisdictional test unknowingly violated not one but several of Appellant's State and Federal Constitutional rights. These issues were discussed in Appellant's Application for Leave to Appeal.[11]

6. **The Court of Appeals' Opinion, Coupled With This Supreme Court's Refusal to Grant Leave to Appeal, Denies Appellant Procedural Due Process In Contravention of the Federal and State Constitutions.**

Appellant, unless this Honorable Court will reconsider, will, after 15 years of administrative and judicial litigation, have been defeated without a chance to offer its defense, by an appellate court which applied *sua sponte* a new jurisdictional approach, as to which neither party had been permitted its day in court, its opportunity to offer available defenses. This should not be, and cannot constitutionally be, permitted.

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knowingly adopted and uniformly applied by the Michigan Department of Treasury. The issues are entirely unrelated. (See discussion Application for Leave to Appeal pp. 24-25.

[11] Application for Leave to Appeal, pp 16-25.

7. **The Court of Appeals Can Inject New Issues *Sua Sponte* But Must Do "Sparingly", "With Full Realization of The Restrictions and Limitations Inherent in the Employment Thereof" and "With the Opportunity of the Parties to the Appeal to Address the New Issues."**

Appellant acknowledges that an appellate court can, in certain circumstances, raise a new issue *sua sponte*. But this power should be used "sparingly" and "with full realization of the restrictions and limitations inherent in the employment thereof." (*City of Dearborn v Bacila*, 353 Mich 99, 118; 90 NW2d 863 (1958), *Vermeyllen v Knight Investment*, 73 Mich App 632, 642-643; 252 NW2d 574 (1977).)

8. **An Appellate Court Cannot Constitutionally Raise *Sua Sponte* a New Issue in its Opinion, and Decide the Appeal Based on that Issue, Without Giving the Parties an Opportunity to Address and to Defend Against a Decision Adverse to it on the New Theory.**

Fundamental principles of fairness, which evoke federal Due Process protection, preclude an appellate court from injecting a new and decisive issue *sua sponte*, without providing an opportunity for the party harmed to defend against the new issue.

In this case the Court of Appeals surprised the parties by injecting the issue for the first time in its Opinion, then denying the Appellant's request for a rehearing to defend against the new issue. This Honorable Supreme

Court next refused leave to appeal, also denying Appellant an opportunity to be heard. *Appellant has clearly been denied federal and state procedural Due Process.*

A leading case on this proposition is *Brinkerhoff-Faris Co v Hill,* 281 US 673 (1930) (Opinion by J. Brandeis). In that case the Missouri Supreme Court, in an effort to avoid paying tax refunds to the taxpayer, reversed an earlier opinion holding that the Missouri State Tax Commission had no power to grant relief of the character sought, then faulted the taxpayer for not having appealed to the State Tax Commission, found the taxpayer guilty of laches in not seeking such relief, and affirmed the trial court which had refused relief, albeit on a different ground.

The parallel in the *Brinkerhoff-Faris* case to the instant case is clear. Here the Department of Treasury had adopted an administrative jurisdictional test which it for 15 years uniformly applied. The PL 86-272 administrative test was widely published by the Department, and was believed throughout the world to be the SBTA jurisdictional test used by Michigan. This matter was tried in the Tax Tribunal based on the PL 86-272 test, and the appeal was briefed and argued based on that test. The Court of Appeals, with no advance notice, adopted *sua sponte* a different test in its Opinion. On these facts, as in *Brinkerhoff,* the taxpayer had absolutely no reason whatsoever to suspect that the appellate court would change the administrative jurisdictional test that the Department and Appellant had relied on for 15 years. In the *Brinkerhoff* case, Justice Brandeis noted, at pp 677-678,

"The possibility of relief before the Tax Commission was not suggested by anyone in the entire litigation until the Supreme Court filed its opinion on June 29, 1929. Then it was too late for the plaintiff to avail itself of the newly found remedy. For, under that decision, the application to the Tax Commission could not be made after the tax books were delivered to the collector, and this had been done on or about October 1, 1927.

The plaintiff seasonably filed a petition for a rehearing in which it recited the above facts and asserted in addition to its claims on the merits, that in applying the new construction . . . to the case at bar, and in refusing the relief because of the newly found powers of the Commission, the court transgressed the due process clause of the 14th Amendment."

In *Brinkerhoff*, the Court held, unanimously, at p 678,

"This court granted *certiorari*, 280 US 550. We are of the opinion that the judgment of the Supreme Court of Missouri must be reversed because it has denied to the plaintiff due process of law – using that term in its primary sense *of an opportunity to be heard and to defend its substantial right.*" (Emphasis added)

In the *Brinkerhoff* case, as in this appeal, the taxpayer had argued that it had been deprived of its equal protection rights in connection with the levy of the tax. The Supreme Court held it was not concerned with the rights of the taxpayer on the merits, noting that they did involve federal constitutional issues on which the opinion of the state courts would not be final, but rather the Court was solely concerned,

> " . . . with the question of whether the plaintiff has been accorded due process in a primary sense whether it has had an opportunity to present its case and be heard in its support."

As to the procedural Due Process issue, the Court in *Brinkerhoff-Faris* stated, as Appellant earlier argued to this Honorable Supreme Court (Application for Leave to Appeals pp 1621), at p 679-680:

> "If the result above stated were attained by an exercise of the State's legislative power, the transgression of the due process clause of the Fourteenth Amendment would be obvious. [citation omitted] The violation is none the less clear when that result is accomplished by the statute judiciary in the course of construing an otherwise valid [citation omitted] state statute. The federal guaranty of due process extends to the state action through its judicial as well as to its Legislative, Executive or Administrative Branches of Government."

In *Ohio Bell Telephone Co. v Public Utilities Commission of Ohio*, 301 US 292 (1936), the Court dealt with a situation where an administrative agency, through exhibits and data submitted in consolidated cases and by judicial notice as to facts which the plaintiff had not been given an opportunity to examine or defend against, deprived Petitioner of its Due Process rights. Petitioner there demanded an opportunity for examination, explanation and rebuttal, and to submit evidence and argument. The Court noted at p 300,

> *"Without warning or even the hint of warning the case would be considered or determined upon any*

> *other basis than the evidence submitted*, the Commission cut down the values for the years after the date certain upon the strength of information secretly collected and never yet disclosed." (Emphasis added).

The Supreme Court found this procedure invalid and a denial of constitutional rights.[12]

Similarly, in *NAACP v Alabama*, 357 US 449, pp 456-457 (1957), the Supreme Court rejected the requirement of a State court that a local rule be followed, when the Petitioner could not fairly be deemed to have been apprised of its existence. There, as here, the State court had attempted to impose a different rule than that reasonably believed to be in existence, and the Supreme Court refused to permit the State court to so thwart Petitioner's due process rights to a fair hearing.

The rationale of the Supreme Court cases cited above, is consistent with normal practice in the Michigan appellate courts. There are many cases in which the Court sees a new or different issue, advises the parties, and requests briefs or supplemental briefs on the issue.[13] This is what

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[12] In *Bouie v City of Columbia*, 378 US 347, 354-355 (1963) the Supreme Court concluded that,

> "When a state court overrules a consistent line of procedural decisions with the retroactive effect of denying a litigant a hearing in a pending case, it thereby deprives him of due process of law 'in its primary sense of an opportunity to be heard and to defend [his] substantive right.' " [Citing Brinkerhoff.]

[13] This is exactly what the Supreme Court ordered in *Amway Corp v Dept of Treasury*, 433 Mich 908; 448 NW2d 348 (1989). See also, *People v Stewart*, 442 Mich 890; 498 NW2d 430

the Court of Appeals should have done, but refused to do, in this case.[14]

The Court of Appeals denied Appellant its procedural due process rights and must be reversed.

9. A Court Cannot Constitutionally Deprive the Plaintiff of an Opportunity to be Heard on An Issue Deemed Determinative By the Court.

Appellant has found no reported decisions where an appellate court deprived a party of its procedural Due Process rights by relying in its Opinion on a new issue, raised *sua sponte* without any notice. Supplemental briefs are apparently always permitted. However, the cases dealing with the *sua sponte* dismissal by a trial court of a plaintiff's case, without hearing, are close to point in terms of Due Process rights.

In *Doe v St Joseph's Hospital of Fort Wayne*, 788 F2d 411 (CA 6, 1985) the Sixth Circuit Court of Appeals reversed such a *sua sponte* dismissal. The Court set the facts, not

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(1993); *People v Hegedus*, 432 Mich 598, 624; 443 NW2d 127 (1989); *Manley v DAIIE*, 425 Mich 140, 168; 988 NW2d 216 (1986); *People v Adams*, 389 Mich 222, 246; 205 NW2d 415 (1973); *In re Young*, 119 Mich App 307, 309; 326 NW2d 492 (1982); *People v Whetstone*, 119 Mich App 546, 551; 326 NW2d 552 (1982).

[14] If it be argued that the Court of Appeals is burdened with many cases, and this was a convenient way of disposing of this case, the U.S. Supreme Court noted in the *Ohio Bell* case, at p 305,

> "There can be no compromise on the footing of convenience or expediency, or because a natural desire to be rid of harassing delay, when that minimal requirement [of due process] has been neglected or ignored."

too dissimilar from those here at issue, in stating, at p 414,

> "After a number of settlement conferences and extensive negotiations between the parties, the district court dismissed the action *sua sponte*. None of the issues involved in the *sua sponte* dismissal had been raised by the defendants. The trial court did not notify either side that it was considering these issues, nor did either side file any briefs in the district court addressing these issues.
>
> "The issues on appeal are the sufficiency of the complaint and the propriety of the district court's *sua sponte* dismissal, without notice to the parties and without affording them an opportunity to be heard." (Footnotes omitted)

The Court next discussed the concept, at p 415,

> "*Sua sponte* dismissals without prior notice or an opportunity to be heard on the issues underlying the dismissal, however, 'generally may be considered hazardous.' (*Tamarai*, 565 F2d at 1198) They may be criticized on several grounds. *First*, they conflict with additional adversarial concepts of justice to the extent that they make the district court 'a proponent rather than an independent entity'. (*Tingler v Marshall*, 716 F2d 1109, 1111 (6th Cir 1983); See *Franklin v Oregon*, 662 F2d 1337, 1342 (9th Cir 1981). *Second*, such dismissals may ultimately waste, rather than economize, judicial resources, by producing appeals and remands that might have been avoided. (See *Salibra v Supreme Court of Ohio*, 730 F2d 1059, 1062 (6th Cir), cert den, ___ US ___ 105 S Ct 295, 83 L Ed 2d 230 (1984); *Tingler v Marshall*, 716 F2d at 1111; *Franklin v*

> *Oregon*, 662 F2d at 1342; *Lewis v New York*, 547 F2d 4 (2d Cir. 1976). *Third, sua sponte dismissals may prejudice plaintiffs by depriving them of an opportunity to amend their complaints or to argue against the dismissal.* (*Tingler v Marshall*, 716 F2d at 1111)"[15] (Emphasis added)

In *Literature, Inc. v Quinn*, 482 F2d 372 (CA 1, 1973) the First Circuit Court of Appeals, in a similar circumstance, held, at p 374,

> "While no motion to dismiss had been filed, a district court may, in appropriate circumstances, note the inadequacy of the complaint and, on its own initiative, dismiss the complaint. [citation omitted] *Yet a court may not do so without at least giving plaintiffs notice of the proposed action and affording them an opportunity to address the issue.* [*Dodd v Spokane County*, 393 F2d 330 (9th Cir. 1968) and p 334] This alone might well justify reversal here, since there is no indication that notice of a possible dismissal was given." (Emphasis added)

Similarly, in *Jefferson 14th Associates v Wometco De Porto Rico, Inc.*, 655 F2d 524 (-A 11, 1983), the 11th Circuit Court of Appeals held, at pp 526-527,

> "The rule that emerges from these cases is that courts may exercise their inherent power to dismiss a suit that lacks merit *only when the party*

---

[15] The Court ultimately concluded, at p 415,

> "We need not answer the question whether a *sua sponte* dismissal without any notice and opportunity to be heard (in fact if not in form) is ever permissible, because in the case before us no sufficient basis for the dismissal was apparent from the pleadings."

> *who brought the case has been given notice and an opportunity to respond . . .* Even if its claim ultimately has no merit, a party who brings a claim in good faith has a due process right to litigate that claim." (Emphasis added)[16]

In the instant case, since the Court of Appeals raised *sua sponte* an issue which had been waived by the Department and which the parties had intentionally not addressed below, on which the Court of Appeals denied Appellant's appeal, the basic due process rights outlined in the federal Circuit Court of Appeals decisions with respect to *sua sponte* trial court dismissals should be applicable.[17]

---

[16] In *Lovell v United States*, 755 F2d 515 (CA 7, 1984) the 7th Circuit Court of Appeals, citing from *Tingler v Marshall*, 716 F2d 1099 (CA 6, 1983), determined what must be done prior to a *sua sponte* dismissal on the merits, at p 516,

> "Under our supervisory power, we hold that a district court faced with a complaint which it believes may be subject to dismissal must: (1) allow service of the complaint upon the defendant; (2) notify all parties of its intent to dismiss the complaint; (3) give the plaintiff a chance to either amend his complaint or respond to the reasons stated by the district court in its notice of intended *sua sponte* dismissal; (4) give the defendant a chance to respond or, file an answer or motions; and (5) if the claim is dismissed, state its reasons for the dismissal."

[17] *Importantly*, the Appellant did not fail to raise an issue because of mistake or poor research. Rather, here the Appellant was defending against a tax assessment by the Department, on a jurisdictional approach uniformly applied by the Department for over a decade. The Department did not, and could not, constitutionally raise the issue injected *sua sponte* by the Court of Appeals. There is no conceivable reason why Appellant could be expected to have raised the issue in the Tax Tribunal.

10. Appellant's Federal and State Due Process Rights Require That It Be Given An Opportunity to Present Every Available Defense, Which Rights the Court of Appeals' Injection *Sua Sponte* of a Determinative Issue For The First Time in Its Opinion, Denied to Appellant.

What are Appellant's basic Due Process rights? Could the Court of Appeals constitutionally raise an issue intentionally waived by the parties, and decide the appeal on that issue, without any notice, briefs or even argument permitted? The cases clearly respond in the negative.

In *16 Am Jur 2d, Constitutional Law, § 843,* p 1048, the treatise states,

> "Due process requires that a party sought to be affected by a proceeding shall have the right to raise such issues or set up any defense which he may have in the cause.
>
> The right to be heard must necessarily embody a right to file motions and pleadings essential to present claims and raise relevant issues. Even if a party has no defense to the action, the fundamental law of the land secures to him the right to be heard in his own defense. *A hearing which does not give the right to interpose reasonable and legitimate defenses cannot constitute due process of law.* Indeed, the United States Supreme Court has said that due process requires that there be an opportunity to present every available defense. [*Lindsey v Normet,* 405 US 56, 31 L Ed 2d 36, 92 S. Ct. 862]" (footnotes omitted) (Emphasis added)

This has long been the rule under the Michigan Constitution's due process provisions.[18]

In *Lindsey v Normet*, 405 US 56, 66; 92 S Ct 862; 31 L Ed 2d 36 (1972) the Supreme Court held,

> " *'Due process requires that there be an opportunity to present every available defense.' American Surety Co. v Baldwin*, 287 US 156, 168 (1932). See also *Nickey v Mississippi*, 292 US 393, 396, (1934)." (Emphasis added)

In *Holt, et al v Virginia*, 381 US 131, 136; 85 S Ct 1375; 14 L Ed 2d 290 (1965), the Court held,

> "And it is settled that due process and the Sixth Amendment guarantee a defendant charged with contempt such as this 'an opportunity to be heard in his defense – a right to his day-in-court . . . and to be represented by counsel.' [citation omitted] The right to be heard must necessarily embody a right to file motions and pleadings essential to present claims and raise relevant issues."

---

[18] In *Weimer v Bunbury*, 30 Mich 200, 210 (1874) (Justice Cooley) held that a process which "gives the party whose property is seized no opportunity to contest the claim set up against him, cannot be due process of law." Likewise, in *Rouse, Hazard & Co. v Circuit Judge*, 104 Mich 234, 239 (1895), this Court described State Constitutional Due Process,

> "The due process of law required by the Constitution means that notice or summons by which a party is tendered his day in court, with the right to frame an issue and be heard before a judgment can be rendered or execution issued which shall take away his liberty or property."

In *Nickey v Mississippi*, 292 US 393, 396; 54 S Ct 743; 78 L Ed 1323 (1933), referenced above, the Court in a tax case held,

> "There is no constitutional command that notice of the assessment of a tax, and opportunity to contest it, must be given in advance of the assessment. *It is enough that all available defenses may be presented to a competent tribunal before exaction of the tax and before the command of the state to pay* it becomes final and irrevocable. [citation omitted]" (emphasis added)

The action of the Court of Appeals is a *clear and flagrant violation* of Appellant's State and Federal Constitutional Due Process rights as to which Appellant is entitled to relief.[19]

11. Other Issues The Court Of Appeals Should Have Decided Before Adopting, sua sponte, Its new Jurisdiction Test.

Technically, for the Court of Appeals to have properly applied *sua sponte* its jurisdictional approach, it would have to have held the PL 86-272 approach administratively uniformly applied by the Department for over 15 years and relied upon by the parties and the court below, was inapplicable. The two jurisdictional approaches are not compatible. To do this it would have

---

[19] Must Appellant proceed in Federal District Court to enjoin enforcement of a final decision of the Michigan state judiciary, in order to be accorded its constitutional right to be heard, and to present its defenses to a new tax jurisdictional theory, before the State deprives it of millions of dollars in taxes?

to have ruled on whether the Department had the power to adopt PL 86-272 as an administrative jurisdictional test in applying the SBTA. If the Department had this power, then the Court of Appeals could not *sua sponte* discard this test and apply another. This issue was never briefed or referenced by the Tribunal below, and was ignored by the Court of Appeals.

Second, the Court of Appeals would have to have ruled whether it could single Appellant out as the only party to which its *sua sponte* jurisdictional test could be retroactively applied 15 years, given the equal protection, due process and uniformity rights of Appellant. This issue, also not raised below or briefed, was also ignored by the Court of Appeals. Apparently, having proceeded *sua sponte* beyond the issues raised at trial and presented to it, the Court of Appeals did not even know these related issues existed. It had incorrectly concluded that, for 15 years, the Department and Appellant, as well as hundreds of other taxpayers, had mistakenly applied PL 86-272 not knowing the SBTA was not an income tax. This mistaken assumption, which the Court of Appeals refused to reexamine, enabled it to quickly dispose of the appeal, albeit by a procedure clearly violative of the Appellant's Due Process rights to a fair hearing and to offer defenses to the new jurisdictional assertion.

RELIEF REQUESTED

Appellant asks that it be given an opportunity to assert its defenses against the SBT Act jurisdictional test the Court of Appeals mistakenly adopted *sua sponte* in its Opinion. If it is given the opportunity to raise these

defenses, Appellant believes the jurisdictional test injected *sua sponte* in the Opinion of the Court of Appeals will be rejected, and this case decided on the issues briefed by the parties. Accordingly, Appellant simply asks for the opportunity to defend itself against the unconstitutional jurisdictional test applied *sua sponte*, for the first time, in the Opinion of the Court of Appeals.

WHEREFORE, Petitioner-Appellant, The Gillette Company respectfully requests this Honorable Supreme Court grant the instant Motion for Reconsideration, and issue its order either (a) granting leave to appeal in this matter, or (b) remanding to the Court of Appeals with instructions to permit the parties to brief the new jurisdictional issue raised *sua sponte* by the Court of appeals in its Opinion, then to reconsider its Opinion in this cause.

Respectfully submitted,

MILLER, CANFIELD, PADDOCK
AND STONE, P.L.C.
SAMUEL J. McKIM III (P-17480)
JOANNE B. FAYCURRY (P-40993)

By /s/ Samuel J. McKim III
Samuel J. McKim III
Attorneys for
150 West Jefferson Suite 2500
Detroit, MI 48226
(313) 963-6420

Dated: May 10, 1994

APPENDIX G

Michigan Supreme Court
Lansing, Michigan

Order
Entered: July 29, 1994

Michael F. Cavanagh
Chief Justice

Charles L. Levin
James H. Brickley
Patricia J. Boyle
Dorothy Comstock Riley
Robert P. Griffin
Conrad L. Mallett, Jr.
Associate Justices

96793(69)

THE GILLETTE COMPANY,

Plaintiff-Appellant,

v

MICHIGAN DEPARTMENT OF TREASURY,

Defendant-Appellee.

SC: 96793
COA: 118660
LC: 073916
090676
090677

On order of the Court, the motion for reconsideration of this Court's order of April 19, 1994 is considered, and it is DENIED, because it does not appear that the order was entered erroneously.

Mallett, Jr., J., would grant reconsideration, and on reconsideration would grant leave to appeal.

[seal]

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of Court.

July 29, 1994 /s/ Jacqueline B. McKinnon
Deputy Clerk

APPENDIX H

NET INCOME TAXES

15 U.S.C. § 381. Imposition of net income tax

(a) **Minimum standards.** No State, or political subdivision thereof, shall have power to impose, for any taxable year ending after the date of the enactment of this Act [enacted Sept. 14, 1959], a net income tax on the income derived within such State by any person from interstate commerce if the only business activities within such State by or on behalf of such person during such taxable year are either, or both, of the following:

(1) the solicitation of orders by such person, or his representative, in such State for sales of tangible personal property, which orders are sent outside the State for approval or rejection, and, if approved, are filled by shipment or delivery from a point outside the State; and

(2) the solicitation of orders by such person, or his representative, in such State in the name of or for the benefit of a prospective customer of such person, if orders by such customer to such person to enable such customer to fill orders resulting from such solicitation are orders described in paragraph (1).

(b) **Domestic corporations; persons domiciled in or residents of a State.** The provision of subsection (a) shall not apply to the imposition of a net income tax by any State, or political subdivision thereof, with respect to –

(1) any corporation which is incorporated under the laws of such State; or

(2) any individual who, under the laws of such State, is domiciled in, or a resident of, such State.

(c) Sales or solicitation of orders for sales by independent contractors. For purposes of subsection (a), a person shall not be considered to have engaged in business activities within a State during any taxable year merely by reason of sales in such State, or the solicitation of orders for sales in such State, of tangible personal property on behalf of such person by one or more independent contractors, or by reason of the maintenance of an office in such State by one or more independent contractors whose activities on behalf of such person in such State consist solely of making sales, or soliciting orders for sales, of tangible personal property.

(d) Definitions. For purposes of this section –

(1) the term "independent contractor" means a commission agent, broker, or other independent contractor who is engage din selling, or soliciting orders for the sale of, tangible personal property for more than one principal and who holds himself out as such in the regular course of his business activities; and

(2) the term "representative" does not include an independent contractor.

(Sept. 14, 1959, P. L. 86-272, Title I, § 101, 73 Stat. 555.)

APPENDIX I

(LOGO)

STATE OF MICHIGAN

DEPARTMENT OF TREASURY

TREASURY BUILDING

LANSING, MICHIGAN 48922

James J. Blanchard, Governor
Robert A. Bowman, State Treasurer

SINGLE BUSINESS TAX BULLETIN 1980-1

JURISDICTIONAL STANDARD

MAY 1, 1980

Sec. 41. "A taxpayer whose business activities are taxable both within and without this state, shall apportion his tax base as provided in this chapter."

Sec. 42. "For purposes of apportionment of the tax base from business activities under this act, a taxpayer is taxable in another state if, (a) in that state he is subject to a business privilege tax, a net income tax, a franchise tax measured by net income, a franchise tax for the privilege of doing business or a corporate stock tax, a tax of the type imposed under this act, or (b) that state has jurisdiction to subject the taxpayer to 1 or more of the taxes regardless of whether, in fact, the state does or does not."

Three court cases have an affect [sic] on the jurisdiction position:

Stockler vs Department of Treasury, 75 Mich App 649 (1977)

Complete Auto Transit, Inc. vs. Brady, 430 U.S. 274 (1977)

Association of Washington Stevedoring Companies, 98 S. Ct. 1388 (1978)

Sec. 31(4). "The tax so levied and imposed is upon the privilege of doing business and not upon income."

In Stockler, the court indicated:

> "We do not perceive the SBT as an income tax. Although federal taxable income is used as the starting point in computing the tax base, it is possible that a taxpayer may have no income and still be subject to the payment of the SBT. Other components of the tax base, e.g., wages, include expenses incurred, a theory not synonymous with income taxes."

In complete Auto and Washington Stevedoring, the court ruled a state tax on "privilege of doing business" is not unconstitutional when applied to an interstate activity if:

(1) There is substantial nexus with the taxing state.

(2) The activity within and without the state is fairly apportioned.

(3) Does not discriminate against interstate activity.

(4) It is fairly related to the services provided by the state.

NEXUS

In arriving at sufficient nexus, the Department will use the court cases developed under Public Law 86-272 as a guide.

The fact that a taxpayer is represented in Michigan by an employee exploring the Michigan market and taking orders to be approved and shipped from outside Michigan will not subject the taxpayer to the SBT. When the employee representing the taxpayer goes beyond the solicitation of sales and provides services for the customer, including but not limited to technical assistance, inventory, stock rotation, or services for the employer, including but not limited to collection of delinquent accounts, warranty work, exchange of damaged merchandise or negotiate settlement of a claim, sufficient nexus is established.

Specifically, the following activities will subject out-of-Michigan persons (including corporations) to the SBT:

(1) A business physically located in Michigan. A physical location includes property owned or rented or an office maintained in a salesperson's home in which the company has a telephone listing in the company name.

(2) The ownership or rental of property used in a business activity.

(3) Services rendered to a purchaser, such as inventories, rotation of stock, building of counter displays, technical assistance in the techniques of using the product.

(4) The ownership of stock on consignment or in public warehouses, a port of which is committed to the Michigan market.

(5) The authority to accept orders.

(6) The exchange of damaged merchandise or warranty assistance.

(7) Conduct credit checks and/or collect delinquent accounts.

(8) The negotiation of complaints or problem accounts.

(9) Performance of a contract.

(10) Performance of service.

APPORTIONMENT

A Michigan taxpayer using a multi-state market will be subject to the same nexus test for a business activity without Michigan as a taxpayer not domiciled in Michigan is subject to when conducting a business activity within this state, whether or not a return is filed in the foreign state.

When a taxpayer has minimal contact with a state in which the taxpayer is apportioning and by apportioning is avoiding taxation in another, the Department will so advise the foreign state under the provision of Section 103.

> "An officer, agent, or employee of this state or of any department or agency of this state may divulge any information set forth or disclosed in a return or report filed under this act or by an investigation or audit authorized under this act

> to an office or department of the state government when it is required for the more effective administration or enforcement of the laws of this state, to any proper officer of the United States department of treasury, and to any proper officer of any other state imposing a tax of a substantially similar nature and reciprocating in this privilege. The commissioner may enter into reciprocal agreements with the United States department of treasury, or taxing officials of other states for the enforcement, collection, and exchange of data in connection with the administration of this act."

When nexus in a foreign state is questionable, the Department will require the taxpayer to obtain a written statement from the foreign state identifying the taxpayer and specific activity conducted which would subject the taxpayer to their jurisdiction.

APPENDIX J

REVENUE ADMINISTRATIVE BULLETINS

RAB 89-46. Jurisdictional Standard

RAB 89-46 replaces Single Business Tax Bulletin 1980-I.

This Bulletin describes the jurisdictional standard to be used in determining whether or not a taxpayer is taxable in another state for purposes of apportionment under Single Business Tax. A taxpayer not subject to tax in another state must allocate the entire tax base to Michigan. [MCL 208.40]

A taxpayer whose business activities are taxable both within and without this State shall apportion his tax base as provided in Chapter 3 (MCL 208.40 through MCL 308.69) of the Single Business Tax Act. [MCL 208.41]

In order to determine nexus in other states, the Single Business Tax Act relies upon MCL 208.42 which states:

> "For the purposes of apportionment of the tax base from business activities under this act, a taxpayer is taxable in another state if, (a) in that state he is subject to a business privilege tax, a net income tax, a franchise tax measured by net income, a franchise tax for the privilege of doing business or a corporate stock tax, a tax of the type imposed under this act, or (b) that state has jurisdiction to subject the taxpayer to 1 or more of the taxes regardless of whether, in fact, the state does or does not."

Three court cases have an effect on the jurisdiction position:

Amway v. Department of Treasury, 176 Mich.App. 285 (1989).

Complete Auto Transit, Inc. v. Brady, 97 S.Ct. 1076, 430 U.S. 274, 51 L.Ed.2d 326 (1977).

Washington Revenue Department v. Stevedoring Association, 98 S.Ct. 1388, 435 U.S. 734, 55 L.Ed.2d 682 (1978).

In *Amway*, the court indicated:

> "Although Amway did pay a nominal fee when it filed its annual reports in Kentucky . . . Amway did not have employees in Kentucky or own or rent property in that state. Although Amway apparently did solicit orders and make sales in Kentucky through independent contractors, and is registered to do business in Kentucky, these do not constitute a sufficient nexus to allow Kentucky to tax Amway [15 USC 381(a), (c)]. . . . Thus, Amway's Kentucky sales are considered Michigan sales. . . . "

In *Complete Auto* and *Stevedoring Association* the United States Supreme Court ruled a state tax on the "privilege of doing business" is not unconstitutional when applied to an interstate activity if:

1. There is substantial nexus with the taxing state, and
2. The activity within and without the state is fairly apportioned, and
3. The tax does not discriminate against interstate activity, and
4. It is fairly related to the services provided by the state.

Nexus

A taxpayer incorporated in the State of Michigan has nexus in Michigan and is therefore subject to Single Business Tax.

In determining whether a taxpayer has sufficient nexus with Michigan, the Department will use the court cases developed under Public Law 86-272 as a guide when the business activity involves sales of tangible personal property. The definition of tangible personal property for this purpose will be determined under each state's respective laws.

The fact that a taxpayer is represented in Michigan by an employee exploring the Michigan market and taking orders to be approved and shipped from outside Michigan will not subject the taxpayer to the SBT. However, when the employee's activity goes beyond the solicitation of sales by providing services for the customer (including but not limited to technical assistance, inventory, or stock rotation) or services for the employer (including but not limited to collection of delinquent accounts, warranty work, exchange of damaged merchandise or negotiate settlement of a claim), there is sufficient nexus with Michigan to subject an out-of-state employer to single business tax. (See exception below for that activity conducted by independent contractors.)

Immunity

Only the sale of tangible personal property is afforded immunity under Public Law 86-272. Therefore, the leasing, renting, licensing or other disposition of tangible

personal property is not afforded any such immunity from taxation. In addition, the selling or providing of services, and the selling, leasing, renting, licensing or other disposition of real estate or intangible property are not governed by the nexus standards of Public Law 86-272. The definition of tangible personal property for this purpose is that to be found under each state's respective laws.

Non-immune Activities. The following in-state activities will cause otherwise immune sales to lose their immunity:

1. Making repairs or providing maintenance.
2. Collecting delinquent accounts.
3. Investigating credit worthiness.
4. Installation or supervision of installation.
5. Conducting training courses, seminars or lectures.
6. Providing engineering functions.
7. Handling customer complaints.
8. Approving or accepting orders.
9. Repossessing property.
10. Securing deposits on sales.
11. Picking up or replacing damaged or returned property.
12. Hiring, training, or supervising personnel.
13. Providing shipping information and coordinating deliveries.

14. Maintaining sample or display room in excess of two weeks (14 days) during the tax year.

15. Carrying samples for sale, exchange or distribution in any manner for consideration or other value.

16. Owning, leasing, maintaining or otherwise using any of the following facilities or property in-state:

    A. Repair shop

    B. Parts department

    C. Purchasing office

    D. Employment office

    E. Warehouse

    F. Meeting Place for directors, officers, or employees

    G. Stock of goods

    H. Telephone answering service

    I. Mobile States (i.e., trucks with driver salespersons)

    J. Real Property or fixtures of any kind.

17. Consigning tangible personal property to any person, including an independent contractor.

18. Maintaining, by either an in-state or an out-of-state resident employee, an office or place of business (in-home or otherwise).

19. Conducting any activity in addition to those described under Immune Activities

below is not an integral part of the solicitation of orders.

Immune Activities. The following in-state activities will not cause the loss of immunity for otherwise immune sales:

1. Advertising campaigns incidental to missionary activities.
2. Carrying product samples for display only or for distribution without charge or other consideration.
3. Owning or furnishing autos to salespersons.
4. Passing customer inquiries and complaints on to the home office.
5. Incidental and minor advertising (i.e., notice in newspaper that a salesperson will be in town at a certain time).
6. Missionary sales activities.
7. Checking of customers' inventories for reorder, but not for other purposes.
8. Maintaining a sample or display room for two weeks (14 days) or less during the tax year.
9. Soliciting sales by an in-state resident employee of the taxpayer, provided the employee maintains no in-state sales office or place of business (in-home or otherwise).

Public law 86-272 provides immunity to certain in-state activities if conducted by an independent contractor that would not be afforded if performed by the taxpayer

directly. Independent contractors may engage in the following limited activities in the State without subjecting the outstate taxpayer to single business tax:

1. Soliciting sales
2. Making sales
3. Maintaining a sales office.

Sales representatives who represent a single principal are not considered to be independent contractors and are subject to the same limitations as employees.

Maintenance of a stock of goods in the State by the independent contractor, under consignment or any other type of arrangement with the principal, shall remove the tax immunity.

Apportionment

A Michigan taxpayer using a multi-state market will be subject to the same nexus test for a business activity without Michigan as a taxpayer not domiciled in Michigan whether or not a return is filed in the foreign state. When a taxpayer has minimal contact with a state and the taxpayer is apportioning to that state, and by such apportioning the tax base the taxpayer is avoiding taxation in another state, the Department will so advise the foreign state under the provisions of MCL 208.103:

> "An officer, agent, or employee of this state or of any department or agency of this state may divulge any information set forth or disclosed in a return or report filed under this act or by an investigation or audit authorized under this act

to an office or department of the state government when it is required for the more effective administration or enforcement of the laws of this state, to any proper officer of the United States department of treasury, and to any proper officer of any other state imposing a tax of a substantially similar nature and reciprocating in this privilege. The commissioner may enter into reciprocal agreements with the United States department of treasury, or taxing officials of other states for the enforcement, collection, and exchange of data in connection with the administration of this act."

When nexus in a foreign state is questionable, the Department will require the taxpayer to file an "Affidavit of Taxability" providing specific information and describing the activity subjecting the taxpayer to the foreign state's tax jurisdiction.

Approved May 31, 1989

RAB 89-46

APPENDIX K

STATE OF MICHIGAN
MICHIGAN TAX TRIBUNAL

THE GILLETTE COMPANY, a Delaware corporation,

Petitioner,

vs.

MTT Docket No. —

REVENUE DIVISION OF THE DEPARTMENT OF TREASURY OF THE STATE OF MICHIGAN,

Respondent.
_____/

PETITION

NOW COMES The Gillette Company, a Delaware corporation, by its attorneys, Miller, Canfield, Paddock and Stone, and complaining against Respondent, represents unto this Honorable Michigan Tax Tribunal as follows:

COUNT I

1. That Petitioner, The Gillette Company ("Gillette" or "Taxpayer"), is a corporation incorporated under the laws of the State of Delaware, with its commercial domicile and principal place of business in Boston, Massachusetts.

2. That Respondent ("Department") is that branch of the Michigan State government charged with administering the Michigan Single Business Tax (the "SBT") under the Michigan Single Business Tax Act (the "Act"),

including the collection of taxes and the issuance of deficiency determinations.

* * *

8. That on or about May 1, 1980, the Department published, but did not promulgate, its "Single Business Tax Bulletin 1980-1, Jurisdictional Standard," a copy of which is attached hereto and made a part hereof as *Exhibit E.*

9. That, for purposes of the issues presented in this proceeding, the Department is applying the jurisdictional test described in its SBT Bulletin 1980-1, which inter alia, provides that " . . . the Department will use the court cases developed under Public Law 86-272 as a guide."

10. That the Department has established the uniform policy of not asserting jurisdiction under the Act over foreign corporations who would not have been taxable in Michigan under an income tax act because falling within the protection of PL 86-272.

* * *

STATE OF MICHIGAN
MICHIGAN TAX TRIBUNAL

THE GILLETTE COMPANY, a
Delaware Corporation,

Petitioner,

vs. Docket No. 90676

STATE OF MICHIGAN,
DEPARTMENT OF TREASURY,
REVENUE DIVISION,

Respondent.
_____/

ANSWER TO PETITION
AND AFFIRMATIVE DEFENSE

NOW COMES the State of Michigan, Department of Treasury, Revenue Division, respondent herein, by its attorneys, Frank J. Kelley, Attorney General, and Richard R. Roesch and Terry P. Gomoll, Assistant Attorneys General, and answers the Petition as follows:

COUNT I

1. The allegations contained in paragraph "1" are admitted.

2. The allegations contained in paragraph "2" are admitted.

* * *

8. The allegations contained in paragraph "8" are admitted.

9. The allegations contained in paragraph "9" are admitted.

10. The allegations contained in paragraph "10" are admitted.

* * *

APPENDIX L

STATE OF MICHIGAN
MICHIGAN TAX TRIBUNAL

The Gillette Company, a
Delaware corporation

Petitioner,

vs. MTT Docket No. 73916

Revenue Division of the
Department of Treasury of
the State of Michigan

Respondent.

PETITIONER'S FIRST INTERROGATORIES
TO RESPONDENT

* * *

12. Has the Department adopted the position that corporations not taxable under PL 86-272, had Michigan enacted a net income tax in lieu of the Single Business Tax Act, will not be taxed by Michigan under the Single Business Tax Act?

13. If the answer to the last preceding interrogatory is affirmative, please state whether this position was taken by the Department effective with the enactment of the Single Business Tax Act?

14. If the answer to the last preceding interrogatory is negative, please state the date the Department's position identified in the second to last preceding interrogatory was taken.

* * *

17. Please specify the case or cases relied upon by the Department as establishing the requirements of PL 86-272, identifying with respect to each case the facts, acts and/or events allegedly present in the instant case for which the case cited by the Department is believed to be authority.

* * *

64. Please state in detail the definition given by the Department to the term "solicitation" as used in PL 86-272.

* * *

70. Did the Department apply PL 86-272 in determining Michigan's jurisdiction to subject interstate businesses not consenting to Michigan's jurisdiction to taxation under the Income Tax Act of 1967, as amended, prior to its repeal?

71. If the answer to the last preceding interrogatory is affirmative, please state whether the Department views the provisions of PL 86-272 as having changed between the years which were subject to the Michigan Income Tax Act and years subject to the instant audit.

* * *

STATE OF MICHIGAN
MICHIGAN TAX TRIBUNAL

THE GILLETTE COMPANY,

Petitioner,

vs. Docket No. 73916

STATE OF MICHIGAN,
DEPARTMENT OF TREASURY,
REVENUE DIVISION,

Respondent.
_____/

ANSWERS AND OBJECTIONS TO INTERROGATORIES

NOW COMES respondent, State of Michigan, Department of Treasury, Revenue Division, by Frederick J. Lynch, Administrator of Single Business Tax, and in answer to petitioner's interrogatories shows unto the Tax Tribunal as follows:

* * *

12. Yes, and administrative policy.

13. No – see Exhibit "1".

14. On or about May 1, 1980, retroactive to January 1, 1976.

* * *

17. The Department has not *relied* upon any specific cases. As indicated in Single Business Tax Bulletin 1980-1, the Department will use the court cases developed under PL 86-272 as a guide for determining sufficient nexus. . . .

* * *

64. The Department has not given any definition to the term "solicitation". As indicated in the answer to Interrogatory No. 17 and in Single Business Tax Bulletin 1980-1, the Department will use the court cases interpreting PL 86-272 as a guide for determining what activities constitute solicitation.

It is the Department's interpretation that the Legislature intended to exercise its taxing power to the extent permitted by PL 86-272. Single Business Tax Bulletin 1980-1 sets forth examples of what activities exceed the solicitation of sales.

* * *

70. Yes.

71. No.

* * *

APPENDIX M

STATE OF MICHIGAN
MICHIGAN TAX TRIBUNAL

THE GILLETTE COMPANY, a
Delaware Corporation,

Petitioner,

v

Docket Nos. 90676
and 90677

STATE OF MICHIGAN,
DEPARTMENT OF TREASURY,
REVENUE DIVISION,

Respondent.
_____/

RESPONDENT'S ANSWERS TO
PETITIONER'S REQUEST/DEMAND FOR ADMISSIONS

Frederick J. Lynch, being duly sworn, says that he is the administrator of the Single Business Tax for the Respondent in the above-entitled action and makes this affidavit in response to Petitioner's Request/Demand For Admissions which were attached to Petitioner's Pre-Hearing statement as Exhibit D.

1. The allegations in statement No. 1 are admitted. The Department's position for determining whether there is sufficient jurisdiction or nexus to impose the single business tax is stated precisely in Single Business Tax Bulletin 1980-1, a copy of which is attached.

* * *

APPENDIX N

MICHIGAN TAX TRIBUNAL

NONPROPERTY TAX

Petitioner:	THE GILLETTE COMPANY	MTT DOCKET NO. 90676
v.		
Respondent:	MICHIGAN DEPARTMENT OF TREASURY	

[PETITIONER'S] PREHEARING STATEMENT

* * *

H. Factual statement of Petitioner and Respondent's Claims:

* * *

> Factual statement of Petitioner's Claims: . . . Basically, Petitioner argues that it is not subject to Michigan statutory jurisdiction under the Single Business Tax Act, either because it does not meet the definition of "business activities" and/or because it is within the protection afforded by PL 86-272.

* * *

EXHIBIT A

FACTUAL ISSUES

* * *

2. Whether taxpayer's activity in Michigan during the period under audit were such as to preclude it from the exemption/protection afforded by PL 86-272?

3. Whether Petitioner engaged in acts in Michigan during 1976 which are not within the term "solicitation" as used in PL 86-272?

* * *

EXHIBIT B

LEGAL ISSUES

1. Whether Michigan has statutory jurisdiction to tax Petitioner under the Single Business Tax Act:

* * *

(b) Whether Petitioner's activities brought it within the protection of Public Law 86-272.

* * *

EXHIBIT D

REQUEST/DEMAND FOR ADMISSIONS

1. That in determining jurisdiction under the Single Business Tax the Department will only assert jurisdiction if it is concluded that taxpayer's activities within Michigan in the period under audit exceed the activities protected by PL 86-272.

MICHIGAN TAX TRIBUNAL

NONPROPERTY TAX

Petitioner:	THE GILLETTE COMPANY	MTT DOCKET NO. 90676

v.

Respondent: MICHIGAN DEPARTMENT OF TREASURY

[RESPONDENT'S] PREHEARING STATEMENT

* * *

H. Factual statement of Petitioner and Respondent's Claims:

1. Count I:

Petitioner's primary claim is that its business activities in Michigan do not exceed the activities protected under Public Law 86-272 and that, therefore, respondent is prohibited from imposing a single business tax upon petitioner by PL 86-272. . . .

It is respondent's position that petitioner's activities in Michigan in 1977 exceed the activities protected by PL 86-272 and that, therefore, petitioner is subject to the single business tax. . . .

* * *

APPENDIX O

STATE OF MICHIGAN
MICHIGAN TAX TRIBUNAL

The Gillette Company, Petitioner	)	MTT Docket No. 73916, 90676-7
v	)	Assessment No. B317249, C087970 and C053035
Department of Treasury, Respondent	)	Account No. 04-1366970

OPINION AND JUDGMENT

Tribunal Judges Presiding
Randall H. Darnell
William F. Koney

Statement of Facts

This matter, consolidated Single Business Tax deficiency assessment appeals, was heard at Detroit, Michigan, commencing on March 23, 1987 and concluding on April 2, 1987. The tax years involved are 1976 through 1981. The following amounts are at issue:

Year(s)	Tax	Penalty	Interest
1976	$ 69,665	$17,416.25	$ 33,482.56
1977	61,286	15,321.50	36,013.82
1978-81	353,279	88,319.75	122,631.55

Petitioner (Gillette), a Delaware corporation with its base of operations located in Boston, Massachusetts, is a manufacturer and wholesaler of razors, personal products, toiletries and Paper Mate pens. Gillette consists of various divisions which changed during the years in question but were inclusive as follows:

Name	Purpose
Gillette, North America	To oversee
Safety Razor	Manufacturing
Personal Care	Toiletries
Paper Mate	Pens, Lighters, etc.
Braun, North America	German – Sales Arm

Petitioner manufactures and sells products throughout the United States through these various divisions.

During 1976, Gillette employed 18 full-time salesmen and 22 part-time merchandisers in Michigan. The salesmen were provided with rented automobiles and a car trunk inventory of select Gillette products. The salesmen's duties included taking orders for merchandise, replacing defective merchandise and reviewing dealer displays for proper setting to promote saleability. The car trunk inventory of select Gillette products included promotional items and some replacement merchandise. The merchandiser's function included placement of products on customer shelves and keeping management aware of product needs for inventory management. A more detailed job description of merchandisers was presented in Respondent's Exhibit R-16.

Petitioner had the following recorded activities in the State of Michigan during 1976:

Sales	$21,487,229
Used or Consumed Property	54,430
Taxable Sales	46,870
Selling Aids and Promotional Merchandise	7,495
Rent Paid for Rental Cars in Michigan	223,056

Distribution by salesmen during solicitation included samples, displays, free goods, selling aids, promotional material and complimentary merchandise. During the period 1977 through 1981, the Petitioner employed 18 full-time and 14 part-time employees in Michigan.

Gillette North America had one full-time employee during 1980 and 1981 who held the position of senior district merchandising manager. This merchandising manager had a position outline which was included in Respondent's Exhibit R-16. Duties of the senior district merchandising manager included:

1. To develop rapport with local divisional management;

2. To develop action plans to correct retail problems and to advise division management;

3. To develop and maintain communication flow between local division management and merchandisers;

4. To call on key accounts jointly with sales force;

5. To be responsible for merchandisers – staffing, objectives, productivity, motivation and team spirit;

6. To attend local sales meetings;

7. To develop market evaluation and recommend improvements;

8. To develop and update market profile;

9. To coordinate GNA business objectives; and

10. To audit replacement merchandise from merchandisers, and return replaced merchandise to Boston for credit.

The senior district merchandising manager was a Dearborn, Michigan resident.

The Safety Razor Division had four full-time employees in Michigan. All were classified as sales representatives. The district sales manager in charge of this group of salesmen was located in the State of Illinois.

The Personal Care Division of Gillette averaged seven full-time employees in Michigan during 1977-1981. Six of the seven were classified as sales representatives, and the remaining person was the district sales manager who had an office in Toledo, Ohio, but performed most of his duties in Michigan and resided in Michigan. The district sales manager duties as presented in Respondent's Exhibit R-16 were:

1. Formulate a sales plan and set objectives;

2. Assist district personnel to achieve objectives;

3. Build and maintain an effective sales force;

4. Maintain effective communication and efficient operations; and

5. Develop knowledge and skills to improve personal performance.

The Paper Mate Division of Gillette averaged four employees in Michigan during 1979-1981. All four employees were classified as sales representative and supervised by a district manager located in the State of Illinois. The district manager performed administrative duties in and outside of Michigan. Some duties of the district sales manager were:

1. Accompany sales people on calls;

2. Provide management support;

3. Evaluate and critique the performance of sales personnel;

4. Screen and select prospective salesmen when needed; and

5. Conduct district meetings. (Respondent's Exhibit R-16.)

Braun North America of Gillette had one employee in Michigan for 1977-1981, a sales representative who solicited sales of expensive cameras at various retailers.

Property of the Gillette divisions located in Michigan included samples, free goods and some replacement merchandise. This was included in the trunk inventory kept by salesmen and located in the leased cars provided to the salesmen by Gillette. Display racks were provided to customers by Gillette. Gillette did not retain title to these display racks upon issuance to a customer and, according to Petitioner, the cost of these display racks was expensed in full on the books of the corporation but was required for tax purposes by the Internal Revenue Service to be amortized over a two-year period.

It is the policy of Petitioner to provide leased cars to all salespersons and managers.

The following activities occurred in Michigan during 1976-1981:

Year	Property	Sales	Payroll	Exhibit
1976	$250,523	$21,487,229	$413,079	R-14
1977	$226,256	$22,225,590	$395,177	R-17
1978	$213,704	$22,809,680	$345,402	R-16
1979	$299,728	$24,821,442	$347,822	R-16
1980	$324,559	$29,917,508	$389,676	R-16
1981	$396,512	$34,661,647	$478,186	R-16

The property values above were computed from an average of trunk inventory held by each salesman plus the value of the leased cars. The amounts were supplied by Petitioner with reference to leased car rentals. The use tax returns filed in the State of Michigan by Petitioner provided information regarding trunk inventories of samples and promotional items and of some replacement merchandise.

In 1981, Gillette obtained a Motor Carrier Diesel Fuel Tax License from the State of Michigan for the purpose of operating a commercial motor vehicle in Michigan. This license enabled an individual or business to travel in Michigan as a motor carrier and to receive a six cent per gallon discount on the purchase of diesel fuel. Gillette received $35.75 as a rebate on diesel fuel tax paid for the year 1981. A total of 9,265 miles were traveled by the commercial vehicle registered by Gillette in the State of Michigan during 1981 based on Motor Carrier Diesel Fuel tax returns filed.

In the period of 1976-1981 (the years involved in this appeal), a district sales manager for the Personal Care Division of Gillette also worked and resided in Michigan. The district sales manager was a resident of Bloomfield Township, and was responsible for the Lower Peninsula of Michigan and three counties in the Upper Peninsula. The district sales manager's office was located in Toledo, Ohio, but 30-40% of his working hours were spent in Michigan. The time spent in Michigan involved various duties – eight sales representatives were assigned to him – including working with sales representatives when calling on higher dollar volume accounts, discussing sales strategies, hiring, firing and reviewing performance of sales representatives (four representatives were hired during the tax period 1976-1981) and conducting sales meetings (five per year, two held in Michigan).

Damaged and defective merchandise is eventually returned to Gillette for replacement or adjustment. The larger client or customer is allowed to handle this problem at its own place of business. The sales representative of Gillette will check over the damaged or defective merchandise, send a list to the home office for approval and a credit voucher, and require the customer to destroy the damaged or defective merchandise. There are some accounts, such as Kroger's, that require the sales representative to replace the damaged or defective goods from the car trunk inventory.

Some of the additional duties of the sales representative include explaining Gillette's promotions, such as suggesting advertising methods, pricing and display. The sales representative will follow up on customer displays and

make sure promotions are being implemented. The representative also monitors inventory and notifies customer management if volume is low.

The salesmen negotiate Retail Advertising Display Agreements on Gillette's behalf. This agreement is signed by the customer and the salesman for the purpose of providing an incentive for promotion of certain Gillette products. A display allowance is granted if the customer advertises during the promotion period as agreed.

Discussion and Conclusions of Law

Issues

Petitioner:

1. Are the activities of Gillette's sales force in Michigan protected by P.L. 86-272. P.L. 86-272 prohibits a state from taxing nonresident corporations which solicit sales of tangible property in their state, provided that all orders are accepted out of state and all goods are shipped from inventory out of state.

2. Were Petitioner's Michigan activities sufficient to meet the statutory definition of "business activity" set forth in MCL 208.3(2); MSA 7.558(3)(2)?

3. Should relief be granted from the three factor apportionment formula of the Single Business Tax under *Jones and Laughlin Steel Corp v Department of Treasury* and *Wilson Foods Corp v Department of Treasury*, 145 Mich App 405 (1985), *lv den, reh den* (1986)?

4. Has there been extraordinary delay in the Department's processing of the assessment(s) in this proceeding?

5. Should penalties be waived because Gillette had a good faith difference of opinion with the Department? Petitioner says the jurisdictional issue is one of first impression in Michigan. Michigan has never attempted to define the activities permitted within solicitation.

6. Are these assessments void as a matter of law, and should they be dismissed in their entirety as the Department was without authority or power to issue such assessments under section 87(2) of the Single Business Tax Act?

7. Has Gillette been intentionally and systematically singled out and treated differently than other similar foreign corporations in Michigan? Were these administrative actions discriminatory, arbitrary, systematic and intentional?

Respondent:

1. Whether the activities of Gillette Company in Michigan for the years 1976 through 1981 exceed the activities protected by Public Law 86-272;

2. Whether the Gillette Company engaged in "business activity" in Michigan during the years 1976 through 1981;

3. Whether the Tax Tribunal has subject matter jurisdiction over Petitioner's claim for relief under section 69 of the Single Business Tax Act [MCL 208.69; MSA 7.558(69)];

4. If the Tax Tribunal has subject matter jurisdiction over Petitioner's claim for relief under section 69, whether the allocation and apportionment provisions of the SBTA fairly represent the extent of Petitioner's business activities within Michigan for the years 1976 through 1981;

5. Whether the Tax Tribunal has authority to cancel penalty on the assessments issued against Petitioner; and

6. Was there any action taken by the Department which violated Petitioner's due process and/or equal protection rights under the United States and Michigan constitutions or the uniformity requirement under the Michigan constitution?

Having considered all the evidence and testimony presented, we conclude that Petitioner is not protected by P.L. 86-272 because it has gone beyond the solicitation definition of P.L. 86-272 for the years 1980 and 1981 and beyond the *Scripto v Carson* [362 U.S. 207 (1960)] case as utilized as a guide by the Department during 1976-1979.

SBT Bulletin 1978-3, citing previous Questions and Answers, stated:

> "We conclude that as the SBT is not a net income tax or measured by net income that PL 86-272 will not be used to determine nexus. The Department will follow the guidelines set forth in the *Scripto v Carson* case wherein solicitation in the state by employees, brokers or independent representatives would subject the taxpayer to the SBT. We would be limited by the *National Bellas Hess* case [*National Bellas Hess, Inc v Illinois Department of Revenue,* 386 U.S. 753] in that out-

> of-state mail order activities would not be subject to the SBT." A firm using the Michigan market would be required to apportion its business activity to Michigan if it is represented in Michigan by an employee, broker or independent representative who exclusively represents that firm. The mere solicitation or presence in this state is sufficient to subject the activity to a fairly apportioned single business tax.

SBT Bulletin 1980-1 states, in part, under the heading of "Nexus" as follows:

> In arriving at sufficient nexus, the Department will use the court cases developed under Public Law 86-272 as a guide.
>
> The fact that a taxpayer is represented in Michigan by an employee exploring the Michigan market and taking orders to be approved and shipped from outside Michigan will not subject the taxpayer to the SBT. When the employee representing the taxpayer goes beyond the solicitation of sales and provides services for the customer, including but not limited to technical assistance, inventory, stock rotation, or services for the employer, including but not limited to collection of delinquent accounts, warranty work, exchange of damaged merchandise or negotiate settlement of a claim, sufficient nexus is established.

SBT Bulletin 1980-1 also identified specific business activities which would subject a corporation to the Single Business Tax. Those activities are:

1. A business physically located in Michigan. A physical location includes property owned or rented or

an office maintained in a salesperson's home in which the company has a telephone listing in the company name.

2. The ownership or rental of property used in a business activity.

3. Services rendered to a purchaser, such as inventories, rotation of stock, building of counter displays, technical assistance in the techniques of using the product.

4. The ownership of stock on consignment or in public warehouses, a portion of which is committed to the Michigan market.

5. The authority to accept orders.

6. The exchange of damaged merchandise or warranty assistance.

7. Conduct credit checks and/or collect delinquent accounts.

8. The negotiation of complaints or problem accounts.

9. Performance of a contract.

10. Performance of service.

Public Law 86-272 provides as follows:

> (a) No State, or political subdivision thereof, shall have power to impose, for any taxable year ending after September 14, 1959, a net income tax on the income derived within such State by any person from interstate commerce if the only business activities within such State by or on behalf of such person during such taxable year are either, or both, of the following:

(1) the solicitation of orders by such person, or his representative, in such State for sales of tangible personal property, which orders are sent outside the State for approval or rejection, and, if approved, are filled by shipment or delivery from a point outside the State; and

(2) the solicitation of orders by such person, or his representative, in such State in the name of or for the benefit of a prospective customer of such person, if orders by such customer to such person to enable such customer to fill orders resulting from such solicitation are orders described in paragraph (1).

(b) The provisions of subsection (a) of this section shall not apply to the imposition of a net income tax by any State, or political subdivision thereof, with respect to –

(1) any corporation which is incorporated under the laws of such State; or

(2) any individual who, under the laws of such State, is domiciled in, or a resident of, such State.

(c) For purposes of subsection (a) of this section, a person shall not be considered to have engaged in business activities within a State during any taxable year merely by reason of sales in such State, or the solicitation of orders for sales in such State, of tangible personal property on behalf of such person by one or more independent contractors, or by reason of the maintenance, of an office in such State by one or more independent contractors whose activities on behalf of such person in such State consist solely of making sales, or soliciting orders for sales, of tangible personal property.

(d) For purposes of this section –

(1) the term "independent contractor" means a commission agent, broker or other independent contractor who is engaged in selling, or soliciting orders for the sale of, tangible personal property for more than one principal and who holds himself out as such in the regular course of his business activities and

(2) the term "representative" does not include an independent contractor.

Solicitation is defined in *Aetna Bldg Maintenance Co v West*, 39 Cal2d 198; 246 P2d 11, 15 as follows: " . . . to ask for with earnestness . . . to endeavor to obtain . . . or to invite" [*Black's Law Dictionary*, 3d ed., p. 1639], and " . . . implies personal petition and importunity addressed to a particular individual to do some particular thing . . . " [*Golden & Co v Justice's Court*, 23 CalApp 778, 798; 140 P 49].

In addition, on July 11, 1986, the Multistate Tax Commission adopted a resolution to further define the limitations of the word "solicitation". Section IIA of the resolution defines non-immune activities (activity which has gone beyond the definition of solicitation) and Section IIB defines immune activities (activity that has not gone beyond the definition of solicitation). The two sections are as follows:

A. Non-Immune Activities: The following in-state activities will cause otherwise immune sales to lose their immunity:

1. Making repairs or providing maintenance.

2. Collecting delinquent accounts.

3. Investigating credit worthiness.
4. Installation or supervision of installation.
5. Conducting training courses, seminars or lectures.
6. Providing engineering functions.
7. Handling customer complaints.
8. Approving or accepting orders.
9. Repossessing property.
10. Securing deposits on sales.
11. Picking up or replacing damaged or returned property.
12. Hiring, training or supervising personnel.
13. Providing shipping information and coordinating deliveries.
14. Maintaining sample or display room in excess of two weeks (14 days) during the tax year.
15. Carrying samples for sale, exchange or distribution in any manner for consideration or other value.
16. Owning, leasing, maintaining or otherwise using any of the following facilities or property in-state:
    a. Repair shop.
    b. Parts department.
    c. Purchasing office.
    d. Employment office.

e. Warehouse.

f. Meeting place for directors, officers, or employees.

g. Stock of goods.

h. Telephone answering service.

i. Mobile stores, *i.e.*, trucks with driver salesmen.

j. Real property or fixtures of any kind.

17. Consigning tangible personal property to any person, including an independent contractor.

18. Maintaining, by either an in-state or an out-of-state resident employee, of an office or place of business (in-home or otherwise).

19. Conducting any activity in addition to those described in paragraph IIB below which is not an integral part of the solicitation of orders.

B. Immune Activities: the following in-state activities will not cause the loss of immunity for otherwise immune sales:

1. Advertising campaigns incidental to missionary activities.

2. Carrying samples only for display or for distribution without charge or other consideration.

3. Owning or furnishing autos to salesmen.

4. Passing inquiries and complaints on to home office.

5. Incidental and minor advertising, *i.e.*, notice in newspaper that a salesman will be in town at a certain time.

6. Missionary sales activities.

7. Checking of customers' inventories (for reorder, but not for other purposes).

8. Maintaining sample or display room for two weeks (14 days) or less during the tax year.

9. Soliciting of sales by an in-state resident employee of the taxpayer; provided the employee maintains no in-state sales office or place of business.

We conclude that Petitioner went beyond the definition of solicitation while conducting its business activities within the State of Michigan. The following activities by the Petitioner support that conclusion:

1. Salesmen had supplies of Gillette products in the trunks of their leased cars, which were used to replace damaged or returned property;

2. In 1976, Petitioner employed 22 part-time merchandisers. These merchandisers faced and dusted merchandise, proportioned all racks, shelves and displays, replaced damaged merchandise, etc. (see Exhibit R-16). During 1977-1981, Petitioner employed a district manager and salesmen who performed activities which included merchandisers' functions, but no merchandisers were employed in 1977;

3. Automobiles were furnished to the senior merchandising manager and district sales manager (P.L.

86-272 permits automobile for solicitors but not for others);

4. Sales planning was done by the district manager of the Personal Care Division whose office was in Toledo, Ohio, but who resided in Michigan. He held some meetings with employees in Michigan. He hired and trained new employees, held sales meetings and performed the majority of his work in Michigan. He handled promotions of salesmen and their periodic evaluations;

5. One of the district managers had an office in his home which was located in Michigan;

6. The district sales manager made sales calls with sales representatives for purposes of training. If the client called upon was a large client, the district sales manager took a passive roll. The district sales manager was in the field in Michigan calling on major customers or training sales representatives on an average of two days each week;

7. The district sales manager conducted approximately five sales meetings a year – two in Michigan and three in Toledo, Ohio; and

8. Salesmen usually set up displays.

Petitioner had business activity within MCL 208.3(2) which states:

> "Business activity" means a transfer of legal or equitable title to or rental of property, whether real, personal, or mixed, tangible or intangible, or the performance of services, or a combination thereof, made or engaged in, or caused to be made or engaged in, within this state, whether

> in intrastate, interstate, or foreign commerce, with the object of gain, benefit, or advantage, whether direct or indirect, to the taxpayer or to others, but shall not include the services rendered by an employee to his employer, services as a director of a corporation, or a casual transaction. Although an activity of a taxpayer may be incidental to another or other of his business activities, each activity shall be considered to be business engaged in within the meaning of this act.

The Petitioner did, in fact, transfer tangible, personal property upon filling orders which was the result of receipt of proper consideration. This action by Petitioner was a matter of everyday occurrence. Petitioner questioned the actual passage of the title of goods. MCL 208.3(2) clearly states that the activity can be intrastate, interstate or foreign commerce engaged in within this state and still fall into the confines of the definition of business activity. Therefore, the place of passage of the title of goods does not preclude imposition of the Single Business Tax. The Petitioner, in addition, has an objective which is profit. Average annual sales in the State of Michigan exceeded $21,000,000, which is one of the highest gross profit totals of all states in which Gillette does business. With this level of sales activity, and based on testimony at trial, we find that the larger customers serviced by Petitioner necessarily required special attention in order to retain them. We conclude that Petitioner's business activity in Michigan was beyond the solicitation protected under P.L. 86-272 for the years 1976-1981 and is therefore subject to tax under MCLA 208.3(2) and MCLA 208.31. That activity was necessary for Petitioner to retain

business and to maintain a good client relationship with the larger-than-average customer.

Petitioner has asked for relief from the three-factor apportionment formula of the Single Business Tax. The apportionment method is found in section 45 of the Act where it is stated:

> All of the tax base, other than the tax base derived principally from transportation, financial or insurance carrier services or specifically allocated, shall be apportioned to this state by multiplying the tax base by a fraction, the numerator of which is the property factor plus the payroll factor plus the sales factor, and the denominator of which is 3. MCLA 208.45.

Section 69 of the Act stated, during the taxable periods at issue:

> (1) If the apportionment provisions of this act do not fairly represent the extent of the taxpayer's business activity in this state, the taxpayer may petition for or the commissioner may require, in respect to all or any part of the taxpayer's business activity, if reasonable:
>
> (a) Separate accounting.
>
> (b) The exclusion of any one or more of the factors.
>
> (c) The inclusion of one or more additional factors which will fairly represent the taxpayer's business activity in this state.
>
> (d) The employment of any other method to effectuate an equitable allocation and apportionment of the taxpayer's tax base.

(2) An alternative method will be effective only if it is approved by the commissioner. MCLA 208.69.

Petitioner's request is based on a Court of Appeals decision which ordered an alternative apportionment formula where the three-factor formula distorted the taxpayer's business activity in Michigan. Since this ruling, there have been additional rulings including *Trinova Corporation v State of Michigan,* 166 Mich App 656 (1988). This decision by the Court of Appeals conflicts with the prior decision entitled *Jones & Laughlin Steel Corp v Department of Treasury,* 145 Mich App 405 (1985), *lv den* 424 Mich 895 (1986). In *Trinova, supra,* the Court of Appeals said, at page 663, " . . . the fallacy of Trinova's instant claim is that it focused only on those factors which distorted the average percentage in a manner supporting its claim of overevaluation and failed to recognize the offsetting factors inherent in the apportionment formula. Likewise, this was the error in *Jones & Laughlin.*"

In addition, 1987 Public Act 39, effective June 8, 1987, amended section 69, was ordered to take immediate effect, and clearly states that it is an amendatory act. It is curative. It clarifies the existing procedures and the standard for granting relief under Section 69 of the Single Business Tax Act.

Subsection 3 of Section 69 indicates that business activity must be presumed to be fairly represented if the adjusted tax base is less than 50% of apportioned gross receipts. In this case, there was no testimony to indicate the Petitioner was outside of the limit imposed by Subsection 3 of Section 69.

As the Tribunal noted in *Avery International Corp v Michigan Department of Treasury*, 5 MTT 339, 349 (1988), "[I]t is also apparent to this Tribunal that the elimination of a component of this apportionment formula followed by the adding back of the actual amount expensed in the State of Michigan of that distorted component, based on a random selection process, is not proper, especially when no consideration is made for the distortion of the other component parts."

We conclude *Jones & Laughlin Steel Corp, supra,* is not applicable here.

Petitioner's next issue is the delay in the processing of the assessment(s) in this proceeding. The Tribunal finds no evidence from testimony presented that the aforementioned delay was extraordinary or even occurred.

With reference to penalties assessed against Petitioner, Section 32 of the Tax Tribunal Act allows the Tribunal to modify an assessment. In addition, MSA 7.657(24)(3) provides that, if an SBT return is not filed timely, the penalty may be waived if it is shown that the failure was due to reasonable cause and not to willful neglect. We hold that Petitioner's failure to return or pay the Single Business Tax was due to reasonable cause and is not subject to the penalties provided under MCL 208.81(4) or (5). The proofs presented support the position that Petitioner had an honest difference of opinion as to effect of a new law. Here, Respondent had not formulated a final policy of administering the new act that dealt with the nexus issue. Penalties should be cancelled but interest should be applied.

As to the administrative discrimination issue, the proofs presented were absolutely devoid of any evidence of administrative discrimination against Petitioner on the part of Respondent.

The issues presented under Section 69 are rendered moot based on our decision in this cause.

Petitioner's motion for a judgment made after Respondent's proofs were presented was held in abeyance pending completion of all proofs in this matter. This motion is also rendered moot because of our decision in this cause.

Judgment

IT IS HEREBY ORDERED AND ADJUDGED that Assessments No. B317249, C087970 and C053035 shall be MODIFIED to the extent that all penalties assessed shall be and hereby are CANCELLED. The taxes and interest assessed shall be and hereby are AFFIRMED.

MICHIGAN TAX TRIBUNAL
By /s/ Randall H. Darnell
By /s/ William F. Koney

Entered: February 13, 1989

APPENDIX P

STATE OF MICHIGAN
COURT OF APPEALS

THE GILLETTE COMPANY,

Petitioner, Appellant,

vs.

MICHIGAN DEPARTMENT OF TREASURY,

Respondent, Appellee.

Court of Appeals No. 118660

MTT Nos. 73916, 90676, 90677

_____/

APPELLANT'S ERRATA BRIEF
ORAL ARGUMENT REQUESTED

MILLER, CANFIELD, PADDOCK AND STONE
Samuel J. McKim, III, P.C. (P-17480)
Robert F. Rhoades (P-28160)
Joanne B. Faycurry (P-40993)
150 West Jefferson
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Detroit, Michigan 48226
(313) 963-6420

STATEMENT OF ISSUES

I. DO THE ACTIVITIES OF GILLETTE WITHIN MICHIGAN EXCEED THE ACTIVITIES PROTECTED BY PL 86-272?

The Tax Tribunal held "Yes".
Petitioner/Appellant says "No".
Respondent/Appellee says "Yes".

* * *

APPENDIX Q

STATE OF MICHIGAN

IN THE SUPREME COURT

THE GILLETTE COMPANY,

Petitioner-Appellant,

vs

MICHIGAN DEPARTMENT OF TREASURY,

Respondent-Appellee.

_____/

Supreme Court No. 96793

Court of Appeals No. 118660

MTT Docket Nos. 73916, 90676, 90677

Samuel J. McKim III (P-17480)
Robert F. Rhoades (P-28160)
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_____/

SUPPLEMENTAL BRIEF IN SUPPORT OF APPELLANT'S MOTION FOR RECONSIDERATION

RECEIVED
JUN 2 1994
CORBIN R. DAVIS
CLERK SUPREME COURT

SUPPLEMENTAL BRIEF IN SUPPORT OF APPELLANT'S MOTION FOR RECONSIDERATION

In this Supplemental Brief, Appellant would inform this Honorable Supreme Court of information that has just come to its attention, and which adds an additional issue of significant public interest and which involves additional principles of major significance to the state's jurisprudence.

BACKGROUND – PRIOR ARGUMENT ON APPEAL

A. The Original Application for Leave to Appeal

Appellant, in its original application for leave to appeal, attempted to demonstrate that this matter was of *significant public interest* and also of *major significance to the State's jurisprudence*, by showing, *inter alia*, how the decision of the Court of Appeals below mistakenly changed the Department of Treasury's long-standing (17 year) administrative policy of using Federal Public Law 86-272 to determine whether it could assert jurisdiction under the Single Business Tax over foreign companies doing business in Michigan in interstate commerce. (MCL 208.1 *et seq.*; MSA 7.558(1) *et seq.*) (the "SBT Act") The Court of Appeals did not apparently understand this was an intentionally adopted long-standing administrative policy, nor did it invalidate it. It mistakenly thought the Department only applied PL 86-272 because the Department thought it was applicable according to its terms. The Court of Appeals therefore established a different jurisdictional standard, raising the issue *sua sponte* for the first time in its Opinion, with no forenotice to the parties. The retroactive imposition back 17 years of a different

jurisdictional standard and the consequent refusal to treat Appellant uniformly with other potential taxpayers violated both the United States and Michigan Constitutions. This Honorable Supreme Court denied leave to appeal. (Justice Mallet would have granted leave.)

B. The Motion for Reconsideration

In its Motion for Reconsideration, Appellant has asserted that the Court of Appeals' *sua sponte* injection of a new and decisive issue, for the first time in its Opinion, without according the Appellant an opportunity to defend, or even address the issue, also deprived Appellant of its federal and state procedural due process constitutional rights. The Motion for Reconsideration is still pending.[1]

---

[1] Until recently the Michigan statute specifically prohibited the approach here used by the Court of Appeals. Section 601.11 of the Compiled Laws of 1948 provided, *inter alia*,

> "And after the arguments of any cause, or when the same is submitted on briefs, if the court is of the opinion that [a] certain point or legal proposition is involved which is material to the decision of the case, and which has not been raised or argued by counsel on either side, *the case shall not be decided on such point or proposition until both counsel have had an opportunity to argue the same before the court.*" (Emphasis added)

This provision was enacted in 1883 Public Acts 45 and was apparently the law until the enactment of the RJA in 1961.

THE BASIS FOR THIS SUPPLEMENTAL BRIEF

On or about April 18, 1994, the Department forwarded to Oral B Laboratories, Inc., and Parker Pen USA Ltd., subsidiaries of Appellant in this proceeding, a "Notice Of Inquiry Concerning Michigan Single Business Tax." (See ***Exhibit A*** attached hereto.) Appellant, and its legal counsel, have ascertained that the Department of Treasury is in the process of forwarding approximately 1,500 such notices to a variety of businesses operating in interstate commerce which have not filed SBT tax returns presumably believing Michigan was determining SBT Act jurisdiction under the PL 86-272 test administratively adopted and applied by the Department since 1980. The Department is now asserting retroactive jurisdiction under a different much stricter test, purportedly solely on the basis of the Opinion of the Court of Appeals below. (See Affidavit of Samuel J. McKim III, legal counsel for Appellant, attached hereto as ***Exhibit B***.)[2]

The decision of the Court of Appeals below, *sua sponte* adding an issue based on mistaken information,

---

[2] Appellant asks this Honorable Supreme Court to take judicial notice of the Department's actions taken after, but based upon, the incorrect Opinion from which Appellant seeks to appeal. Such notice is requested only *to establish the extreme importance* of this appeal to the jurisprudence of the State and not as a basis for determining the alleged unconstitutionality of the procedures used by, and the result ordered by the *sua sponte* action of the Court of Appeals. (See generally, State *ex rel Attorney General v Binder*, 356 Mich 73, 77; 96 NW2d 140 (1959), *People v Michigan Central Railroad Co.*, 145 Mich 140, 154-155; 108 NW 772 (1906) (Op'n by Grant, J.) and *In re Stowe*, 162 Mich App 27, 33; 412 NW2d 655 (1987).

will now affect not only Appellant, retroactively for 17 years, but also over a thousand other potential SBT taxpayers, retroactively 5 years through 1989. This, Appellant respectfully submits, makes these issues of even greater *significance to the state's jurisprudence* and of even greater *significant public interest.*

Ironically, it was in 1989 that the Department's Revenue Administrative Bulletin 89-46 (replacing Single Business Tax Bulletin 1980-1), again stated, *inter alia.* "in determining whether a taxpayer has sufficient nexus within Michigan, the Department will use the court cases developed under Public Law 86-272 as a guide when the business activity involves sales of tangible personal property." (See ***Exhibit C*** attached hereto.) Scores of potential SBT taxpayers, throughout the United States, indeed throughout the world, for over a decade have relied upon the Department's published bulletins, which have uniformly stated that the Department would apply PL 86-272 as its jurisdictional test.[3] Now, based solely on the improper and unconstitutional decision of the Court of Appeals below, the Department is reneging on its written assurance, and breaking faith with businesses around the world which thought they could rely on the Department's published promises.[4] Now the Department is

---

[3] This is precisely what the Department had repeatedly assured those concerned that they could do. (See RAB 89-34, replacing RAB 87-2, discussed at p 5, infra.)

[4] The SBTA requires the Department to publish rules, using the mandatory word "shall." (MCL 208.80; MSA 7.558(80).) Nevertheless, the Department has refused to do this, and has relied exclusively upon documents such as the 1980 Single Business Tax. Bulletin, and the 1989 Revenue Administration Bulletin, in which it had announced PL 86-272 as the administratively adopted SBT jurisdictional test.

retroactively changing the jurisdictional test back to 1989, the very year in which it had published RAB 89-46, reiterating its administrative commitment to apply the PL 86-272 test.

To exacerbate the fundamental unfairness (and unconstitutionality) of this approach, it must be noted that the Department, in Revenue Administrative Bulletin 89-34, replacing RAB 87-2, informed Appellant and all other potential SBT taxpayers, that they were *entitled to rely on an RAB* as the Department's "official position". The RAB has "status of precedent in the disposition of cases unless and until revoked or modified." Appellant and thousands of others relied on RAB 89-46 establishing PL 86-272 as the administratively adopted SBT jurisdictional test. The Court of Appeals, unknowingly and mistakenly, without even considering those issues, changed the Department's official position retroactively 17 years, and now the Department itself, ignoring RAB 89-34 and RAB 89-46, is retroactively changing its published "official position" on all others, looking back five years, based on the Court of Appeals' opinion below.

Solely because of the Court of Appeals' mistaken and unconstitutional decision below, the Department is, apparently without even retracting its old bulletins, informing taxpayers who acted in reliance upon the Department's repeated published jurisdictional assurances, that the Court of Appeals' decision below requires the Department to retroactively impose a far different jurisdictional test. To describe this as unfair, is an understatement. Interstate businesses which solicited sales in Michigan on the Department's repeated written assurances that their activities were protected from SBT Act taxation if they stayed within permitted "solicitation"

under PL 86-272, are now being taxed retroactively reaching back 5 years, because of the Court of Appeals' decision below. This should not and cannot constitutionally be accomplished.

RELIEF

WHEREFORE, Petitioner-Appellant, the Gillette Company, respectfully requests that this Honorable Supreme Court grant its Motion for Reconsideration, and issue its order either (a) granting leave to appeal in this matter, or (b) remanding to the Court of Appeals with instructions to permit the parties to brief the new jurisdictional issue raised *sua sponte* by the Court of Appeals in its Opinion, and then to reconsider its Opinion in this cause.

Respectfully submitted,

MILLER, CANFIELD, PADDOCK AND STONE, P.L.C.
SAMUEL J. McKIM III (P-17480)
JOANNE B. FAYCURRY (P-40993)

By /s/ Samuel J. McKim III
Samuel J. McKim III
Attorneys for Petitioner-Appellant
150 West Jefferson Suite 2500
Detroit, MI 48226
(313) 963-6420

Dated: June 1, 1994

EXHIBIT A

MICHIGAN DEPARTMENT OF TREASURY
AUDIT DIVISION, DISCOVERY UNIT
P.O. BOX 30140
LANSING, MICHIGAN 48909

NOTICE OF INQUIRY CONCERNING MICHIGAN SINGLE BUSINESS TAX
Review period: Tax years ending in and after 1989.

April 18, 1994

ORAL-B LABORATORIES INC
1 LAGOON DR
REDWOOD CITY, CA 94065

F.E. #93-0570556

Single business tax (SBT) is Michigan's tax on business activity. Every person who is engaged in business activity in Michigan and whose apportioned gross receipts are at least $40,000.00 for tax years beginning before January 1, 1991. $60,000.00 for tax years beginning after December 31, 1990 and before January 1, 1992, and $100,000.00 for tax years beginning after December 31, 1991 must file a Single Business Tax Annual Return.

The Michigan Court of Appeals recently ruled that because SBT is not an income tax Public Law 86-272 does not apply as a basis for determining nexus. Reference: Guardian Industries Corp. v. State Dept. of Treasury (1993) 499 N.W.2d 349, 198 Mich.App. 363 and The Gillette Co. v. Michigan Dept. of Treasury (1993) 497 N.W.2d 595, 198 Mich.App. 299. Therefore, any business having a resident employee, including a sales representative, working in Michigan is subject to SBT. **Your company is**

registered for Michigan withholding tax which indicates that your company is also subject to SBT.

If you are not subject to SBT, please explain why you pay Michigan withholding tax and not single business tax.

If you are subject to SBT, complete the enclosed SBT tax returns. In computing your liability, you must include interest. Refer to the enclosed Revenue Administrative Bulletin 1993-12 for interest rates. The department will waive the penalty for failure to file (50% of the tax due), provided the returns are submitted by May 18, 1994.

Please include a copy of this letter with your completed tax returns or written explanation. A return envelope is enclosed.

This letter of inquiry is issued under authority of Section 21(2)(a) of Act 13 of Public Acts of 1993. If you do not respond within 30 days, a Notice of Intent to Assess for SBT will be issued as provided by Section 24 of the Revenue Act 122, Public Acts of 1941, as amended.

If you have any questions, please call Bob Burke at (517) 335-2114.

Thank you for your cooperation.

MICHIGAN DEPARTMENT OF TREASURY
AUDIT DIVISION, DISCOVERY UNIT
P.O. BOX 30140
LANSING, MICHIGAN 48909

NOTICE OF INQUIRY CONCERNING MICHIGAN SINGLE BUSINESS TAX
Review period: Tax years ending in and after 1989.

April 18, 1994

PARKER PEN U S A LTD
ATTN TAX DEPT
1400 N PARKER DR

F.E. #39-1542750

Single business tax (SBT) is Michigan's tax on business activity. Every person who is engaged in business activity in Michigan and whose apportioned gross receipts are at least $40,000.00 for tax years beginning before January 1, 1991, $60,000.00 for tax years beginning after December 31, 1990 and before January 1, 1992, and $100,000.00 for tax years beginning after December 31, 1991 must file a Single Business Tax Annual Return.

The Michigan Court of Appeals recently ruled that because SBT is not an income tax Public Law 86-272 does not apply as a basis for determining nexus. Reference: Guardian Industries Corp. v. State Dept. of Treasury (1993) 499 N.W.2d 349, 198 Mich.App. 363 and The Gillette Co. v. Michigan Dept. of Treasury (1993) 497 N.W.2d 595, 198 Mich.App. 299. Therefore, any business having a resident employee, including a sales representative, working in Michigan is subject to SBT. **Your company is registered for Michigan withholding tax which indicates that your company is also subject to SBT.**

If you are not subject to SBT, please explain why you pay Michigan withholding tax and not single business tax.

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If you have any questions, please call Bob Burke at (517) 335-2114.

Thank you for your cooperation.

EXHIBIT B

STATE OF MICHIGAN
IN THE SUPREME COURT

THE GILLETTE COMPANY,

Petitioner-Appellant,

v

MICHIGAN DEPARTMENT OF TREASURY,

Respondent-Appellee.

Supreme Court No. 96793

Court of Appeals No. 118660

MTT Docket Nos. 73916 90676, 90677

STATE OF MICHIGAN)
) ss
COUNTY OF WAYNE)

AFFIDAVIT OF SAMUEL J. MCKIM III IN SUPPORT OF APPELLANT'S SUPPLEMENTAL BRIEF IN SUPPORT OF APPELLANT'S MOTION FOR RECONSIDERATION

Samuel J. McKim III, being first duly sworn, deposes and states the following:

1. I am a Partner in the law firm of Miller, Canfield, Paddock and Stone, legal counsel for the Gillette Company, Petitioner-Appellant in this matter.

2. I have read the attached Supplemental Brief and swear that the factual allegations contained therein are true and accurate to the best of my knowledge.

Further Affiant saith not.

/s/ Samuel J. McKim III
Samuel J. McKim III

Subscribed and sworn to before me
this 1st day of June, 1994

/s/ Martha A. Gongle
Acting in Wayne County
Notary Public, Wayne County,
Michigan
MARTHA A. GONGLE
Notary Public, Macomb County,
Michigan
My Commission Expires Sep-
tember 10, 1998

My Commission expires: ___

EXHIBIT C

1989 REVENUE ADMINISTRATIVE BULLETINS

RAB Number

1989-34. Issuance of Bulletins and Letter Rulings.
1989-35. Challenge of Assessment, Decision or Order Limited by Statute.
1989-36. Credit or Refund of Overpayment of Taxes or Credits in Excess of Tax Due and Applicable Interest.
1989-37. Statute of Limitations to Collect an Assessment.
1989-38. Officer Liability.
1989-39. Interpretation of Terms, Disclosure of Tax Return Information.
1989-50. Inchoate Tax Liens.

RAB 89-34. Issuance of Bulletins and Letter Rulings

RAB 89-34 replaces RAB 87-2.

The Michigan Revenue Act empowers the Department of Treasury to periodically issue bulletins that index and explain state tax laws. (See MCL 205.3(f).)

The purpose of this Bulletin is to establish the general procedures for issuing Bulletins and Letter Rulings as position statements of the Bureau of Revenue. These documents are to provide guidance to persons regarding the proper interpretation and application of Michigan tax laws administered by the Bureau of Revenue.

Revenue Administrative Bulletins

A Revenue Administrative Bulletin is a directive issued by the Commissioner of Revenue. Its purpose is to promote uniform application of tax laws throughout the State by the Bureau of Revenue personnel and provide information and guidance to taxpayers. A Revenue Administrative Bulletin states the official position of the Department, has the status of precedent in the disposition of cases unless and until revoked or modified, and may be relied on by taxpayers in situations where the facts, circumstances and issues presented are substantially similar to those set forth in the Bulletin. A taxpayer must consider the effects of subsequent legislation, regulations, court decisions, and Bulletins when relying on a Revenue Administrative Bulletin.

Information to prepare a Bulletin may be derived from the following sources, a list that is not all inclusive: law

changes, judicial decisions, letter rulings, Attorney General Opinions, interpretation of rules, acquiescence and nonacquiescence in decisions of the Michigan Tax Tribunal, and announcements of tax and interest rates as required by law. All Revenue Administrative Bulletins are published in the Department's *Quarterly Tax Advisor* and are also available upon request.

Letter Rulings

A Letter Ruling is a formal document setting forth the position of the Commissioner of Revenue on specific tax matters. It is issued to taxpayers by the Commissioner of Revenue, or designee of the Commissioner, in response to a particular tax issue. Letter Rulings help to promote uniform application of tax laws throughout the State by Bureau of Revenue personnel and to provide guidance to taxpayers. A Letter Ruling is prospective in nature. It provides a taxpayer with assurance regarding the tax ramification of a future transaction. The Department is bound by a Letter Ruling only for the specific transaction and only for the tax period indicated. Letter Rulings are available to the public upon request.

Technical Advice Letters

A Technical Advice Letter is an informal document released by a Tax Division of the Bureau of Revenue. It is issued by designated personnel in response to an inquiry by a taxpayer for technical assistance. Technical Advice Letters are based upon statutes, administrative rules, regulations, and court decisions having precedential value.

These documents are not published and may be relied upon only by the taxpayers requesting their issuance.

Obtaining a Letter Ruling or Technical Advice Letter

A taxpayer or the representative of the taxpayer shall submit a statement to the appropriate Tax Division containing a complete account of the facts relating to a particular tax issue. The taxpayer must document in writing that the issue in question is not being litigated or challenged in an informal hearing of the Department or any other tribunal or court in this State. From this statement, the Tax Division will determine whether a Letter Ruling is needed to clarify the issue. The Division will draft a proposed Ruling then submit it to the Hearings and Tax Research Division for further processing. The Hearings and Tax Research Division determines when a Letter Ruling will be issued.

A Letter Ruling will contain sufficient information to enable a Tax Division or the taxpayer requesting such advice to rely on the Ruling. The Ruling will identify the taxpayer by name, address, identification number and tax year or years involved. The Letter Ruling will contain the pertinent facts, the issue, controlling law, application of law to facts, and a conclusion advising the taxpayer.

A Letter Ruling issued by the Commissioner of Revenue, or the designee of the Commissioner, will be forwarded to the taxpayer and the Tax Division affected by the Ruling. A Letter Ruling may be published after deletion of any matter identifying the taxpayer.

Obsolescence of Letter Rulings and Revenue Administrative Bulletins

A Letter Ruling or Revenue Administrative Bulletin may become or be declared obsolete or revoked under the following conditions:

1. The statutory provision supporting the Letter Ruling or Revenue Administrative Bulletin is amended or repealed or authoritatively construed by an appellate court decision having precedential effect.

2. The substance of the Letter Ruling or Revenue Administrative Bulletin is incorporated into a statute or in the Department of Treasury Administrative Rules.

3. A court decision having precedential value renders the ruling invalid.

When a Letter Ruling or Revenue Administrative Bulletin becomes obsolete, the Department may announce its obsolescence in a Revenue Administrative Bulletin. Subject to statutory authority, the Commissioner of Revenue is empowered to determine the retrospective application of rules and the effective date for applying changes, modifications or nullification of Letter Rulings.

Acquiescence/Nonacquiescence by the Commissioner

The Commissioner or Revenue may announce acquiescence or nonacquiescence in decisions of the Michigan Tax Tribunal and the Court of Claims. Bureau of Revenue

personnel shall rely upon any decision that the Commissioner has acquiesced as having precedential value in the disposition of other tax cases.

If the Commissioner acquiesces in an adverse Tax Tribunal or Court of Claims decision, any contrary Letter Ruling or Revenue Administrative Bulletin shall be promptly modified or revoked.

Approved April 25, 1989

RAB 89-34

RAB 89-35. Challenge of Assessment, Decision or Order Limited by Statute

This Bulletin describes when the time expires for a person to enter a written appeal of the issuance of a final assessment, decision, or order of the Bureau of Revenue, Department of Treasury.

A taxpayer may have a right to appeal a decision, order, assessment or determination of the Department in the following circumstances:

1. A final determination of a tax deficiency, or
2. The denial of a claim for a refund, or
3. The recovery of taxes paid under protest, or
4. Any other decision of the Department, such as denial of tax exempt status.

If the appeal is not made within the time required, then the assessment, decision, or order will become final and may not be challenged further by the taxpayer.

APPENDIX R

STATE OF MICHIGAN
MICHIGAN TAX TRIBUNAL

GILLETTE,

Petitioner(s),

-vs-

MICHIGAN DEPARTMENT OF TREASURY,

Respondent(s).

_____/

No(s): 73916, 90676 and 90677
JUDGES: Koney & Darnell
VOLUME IV
pp. 472 – 628

The Hearing of above matter, taken before Sherry L. Sullivan, CSR 3334, Certified Shorthand Reporter, within and for the County of Macomb, State of Michigan, at 144 E. Lafayette, 13th Floor, Detroit, Michigan, on March 26, 1987 commencing at about 9:30 in the forenoon.

APPEARANCES:

MR. SAMUEL J. McKIM III
MILLER, CANFIELD, PADDOCK AND STONE
1400 NORTH WOODWARD AVENUE
POST OFFICE BOX 2014
BLOOMFIELD HILLS, MICHIGAN 48303-2014

Appearing on behalf of Petitioner(s).

MR. ROBERT F. RHOADES
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POST OFFICE BOX 2014
BLOOMFIELD HILLS, MICHIGAN 48303-2014

Appearing on behalf of Petitioner(s).

[p. 473] MS. LAURINE SYMULA PARMELY
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Appearing on behalf of Petitioner(s).

MR. TERRY P. GOMOLL
ASSISTANT ATTORNEY GENERAL
ATTORNEY GENERAL DEPARTMENT
LANSING, MICHIGAN 48913

Appearing on behalf of Respondent(s).

MR. THOMAS KENNY
ASSISTANT ATTORNEY GENERAL
ATTORNEY GENERAL DEPARTMENT
LANSING, MICHIGAN 48913

Appearing on behalf of Respondent(s).

ALSO PRESENT:

Francis J. Arsenault

* * *

[p. 553] MR. GOMOLL: At this point I would like to call Mr. Frederick Lynch as a witness.

(Witness sworn by the Court Clerk.)

DIRECT EXAMINATION

BY MR. GOMOLL:

Q. Would you please state your name and address for the record?

A. Frederick Lynch 1105 Wildwood, East Lansing.

Q. Where are you employed, Mr. Lynch?

A. Michigan Department of Treasury.

Q. What is your current position?

A. I'm administrator, single business tax division.

* * *

[p. 557] Q. (BY MR. GOMOLL) Mr. Lynch, would you please explain why there are two Nexus bulletins?

A. The Department issued bulletins in an attempt to advise our clientele as to positions that the Department has taken concerning certain issues. This is a situation where we issued a bulletin indicating a position that was taken. This was bulletin 1978-3 we issued in March 1978. We changed the position and issued a subsequent bulletin on the same issue bulletin 1980-1 dated May 1st, 1980.

* * *

[p. 560] Q. (BY MR. GOMOLL) What is the Nexus standard that the Department is currently using?

A. We are following the position put forth in the jurisdictional standard in bulletin 1980-1 dated May 1st, 1980 and basically what we're saying is that we will administratively adopt a standard as outlined in Public Law 86-272.

Q. That is set forth in Proposed Exhibit R-5; is that correct?

A. Yes, sir.

Q. Mr. Lynch, I – let me take a short break here. Okay. Mr. Lynch, I direct your attention to Page 2, Line 1

of Exhibit R-5 and ask you to read the first [p. 561] sentence there?

A. "In arriving at sufficient Nexus, the Department will use the court cases developed under Public Law 86-272 as a guide."

Q. As I understand it, this is a departure of the Scripto standard set forth in the original bulletin?

A. Yes.

Q. Do you recall why the Department changed the position?

A. I think that there probably was discussion within the Department by people that were involved in some of the things. I can't say that I – at the time I was not involved in the administration of this particular tax. Was involved in some of the problems that may develop because of some audit situations. I guess personally I had a couple problems with the prior bulletin and undoubtedly expressed my position and it may have made some small contribution to changing it somewhere.

Q. In your opinion, which of the two standards, Scripto or Public Law 86-272 is more beneficial to a taxpayer such as Gillette, a foreign corporation?

A. P.L. 86-272 is more restrictive on the state than the court cases set forth in Northwest Portland.

Q. Back to the first line that you had read there, what [p. 562] is your understanding of the language the court cases developed under Public Law 86-272 as a guide?

A. My understanding is exactly that. That we will look at court cases involving issues under Public Law 86-272 as a guideline.

* * *

[p. 607] MR. GOMOLL: At this time I'd like to call Mr. Thomas Hoatlin.

(Witness sworn by the Court Clerk.)

DIRECT EXAMINATION

BY MR. GOMOLL:

Q. Please state your name and address for the record?

A. Thomas M. Hoatlin, 2039 Rockway, Lansing, Michigan.

Q. Where are you currently employed?

[p. 608] A. Michigan Department of Treasury.

Q. What's your current position?

A. Deputy Revenue Commissioner.

Q. How long have you held that position?

A. Since 1981.

Q. What was your current position before you were Deputy Revenue Commissioner?

A. The administrator of the single business tax.

Q. How long did you hold that position?

A. From 1976, sometime in '75 to April of 1981.

Q. During your period in your current position, did you ever assume the duties of the Commissioner of Revenue?

A. Yes. I was acting Commissioner of Revenue for a period of 11 months, ending in February of '84, I believe or '85.

Q. How long had you been employed with the Department of Treasury overall?

A. 27 years.

Q. Mr. Hoatlin, maybe you can briefly explain your duties as the Deputy Revenue Commissioner?

A. Title is Deputy of Revenue Commissioner of taxpayer services which means I am the Deputy Revenue Commissioner in charge of all of the taxes administered by the Department of the Treasury.

[p. 609] Q. As Deputy Revenue Commissioner and single business tax administrator, what part did you play in developing the Nexus test for the single business tax?

A. I had a hand in developing both the bulletins along with the staff of single business tax, some field input. Input from the attorney general's office and the deputy revenue commissioner at that time in charge in single business tax, Chester Zawislak and revenue Commissioner, Sidney D. Goodman.

Q. Mr. Hoatlin, I have presented you with copies of Respondent's Exhibits R-5 and R-6 which are the Nexus bulletins. I draw your attention to Page 2 of Exhibit R-5 the 1980 bulletin and ask you to read the first sentence?

A. "In arriving at sufficient Nexus the Department will use court cases developed under Public Law 86-272 as a guide."

Q. Did you help draft that language?

A. Yes, I did.

Q. What is your understanding of the language the courts will use cases developed under Public Law 86-272 as a guide?

A. Public Law 86-272 is a federal limitation on state taxation. There had been a number of cases in [p. 610] various states developing what mere solicitation meant in Public Law 86-272 and we used the various cases in various states to develop our guidelines in arriving at our Nexus test.

* * *

Supreme Court, U.S.
FILED
NOV 29 1994
OFFICE OF THE CLERK

(2)

No. 94-776

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1994

THE GILLETTE COMPANY,

Petitioner,

v.

MICHIGAN DEPARTMENT OF TREASURY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE MICHIGAN COURT OF APPEALS

BRIEF FOR RESPONDENT IN OPPOSITION

FRANK J. KELLEY
Attorney General

Thomas L. Casey
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Assistant Attorneys General
Attorneys for Respondent

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QUESTIONS PRESENTED

I.

DID THE ACTIVITIES OF THE GILLETTE COMPANY IN MICHIGAN EXCEED THE NEXUS STANDARDS IMPOSED BY PUBLIC LAW 86-272 (15 U.S.C. 381 et seq.) AND THE DUE PROCESS/COMMERCE CLAUSE NEXUS STANDARD?

II.

DID THE MICHIGAN COURT OF APPEALS VIOLATE THE GILLETTE COMPANY'S CONSTITUTIONAL RIGHTS TO DUE PROCESS OR EQUAL PROTECTION IN APPLYING THE DUE PROCESS/COMMERCE CLAUSE NEXUS STANDARD TO A PENDING CASE?

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STATEMENT OF THE CASE

A. The Evolution of Michigan's Test for Determining Nexus.

As this Court discussed in Trinova Corp. v. Michigan Dep't of Treasury, 498 U.S. 358; 111 S. Ct. 818; 112 L. Ed. 2d 884 (1991), the Michigan single business tax (SBT) is a value-added tax. It went into effect on January 1, 1976 and replaced seven different business taxes. 498 U.S. at 366. As this Court noted, for apportionment the Michigan SBT uses the same three-factor apportionment formula that was approved for income taxes. 498 U.S. at 380.

One of the initial questions concerning the SBT was the applicable nexus standard; i.e., whether the SBT was a net income tax to which Public Law 86-272 (15 U.S.C. § 381 et seq.) applied

or whether other constitutional limitations restricted the jurisdictional scope of the SBT, such as those set forth in Scripto, Inc. v. Carson, 362 U.S. 207; 80 S. Ct. 619; 4 L. Ed. 2d 660 (1960), or Spector Motor Service, Inc. v. O'Connor, 340 U.S. 602; 71 S. Ct. 508; 95 L. Ed. 573 (1951). This debate was similar to the question concerning whether the Michigan Business Activities Tax was a tax on income or gross receipts. Trinova, supra, 498 U.S. at 366, fn. 4.

Resolution of this question affected two situations. First of all, the nexus standard would determine the minimum level of activities that had to be conducted in Michigan for imposition of the SBT. Secondly, for purposes of appor-

tionment, the nexus standard would determine the minimum level of activities that had to be conducted in another state in order for sales to customers in those states to be eliminated from the numerator of the sales factor.

In regards to the second situation, if a taxpayer is conducting business in Michigan and one or more other states, the tax base of the taxpayer is apportioned and not allocated. Mich. Comp. Laws 208.41 provides:

> Sec. 41. A taxpayer whose business activities are taxable both within and without this state, shall apportion his tax base as provided in this chapter.

The meaning of "taxable in another state" is set forth in Mich. Comp. Laws 208.42 as follows:

> Sec. 42. For purposes of apportionment of the tax base from business activities under this act, a taxpayer is taxable in another state if, (a) in that state he is subject to a business privilege tax, a net income tax, a franchise tax measured by net income, a franchise tax for the privilege of doing business or a corporate stock tax, a tax of the type imposed under this act, or (b) that state has jurisdiction to subject the taxpayer to 1 or more of the taxes regardless of whether, in fact, the state does or does not.

If a taxpayer is taxable in another state, the numerator of the sales factor of the apportionment formula is determined in accordance with Mich. Comp. Laws 208.51 and Mich. Comp. Laws 208.52 which provide:

> Sec. 51. The sales factor is a fraction, the numerator of which is the total sales of the taxpayer in this state during the tax year, and the denominator of which is the total sales of the taxpayer everywhere during the tax year.
>
> Sec. 52. Sales of tangible personal property are in this state if:

> (a) The property is shipped or delivered to a purchaser, other than the United States government, within this state regardless of the free on board point or other conditions of the sales.
>
> (b) The property is shipped from an office, store, warehouse, factory, or other place of storage in this state and the purchaser is the United States government, or the taxpayer is not taxable in the state of the purchaser. For the purposes of this subdivision only, "state" means any state of the United States, the District of Columbia, the commonwealth of Puerto Rico, any territory or possession of the United States, or political subdivision thereof.

(emphasis added).

The sales to which subsection 52(b) applies are commonly referred to as "throwback sales". If the taxpayer is not taxable in the state of the customer (state of destination), the sales are "thrownback" to the state from where the property was shipped (the state of origination).

When the SBT was enacted in 1976, at least one commentator analyzed the nexus standards. In Opper, Constitutional Aspects of the Single Business Tax Act, 22 Wayne L. R. 1167 (1976), the author concluded that PL 86-272 was not applicable to the SBT. Mr. Opper stated:

> Conceptually, the SBT is a consumption-type, value-added tax which, like the South Carolina liquor sales regulatory scheme in Heublein, was not contemplated by Congress when it enacted section 381. Rather, it considered only the particular category of state net income taxes involved in the Northwestern States decision. Moreover, no court ever has held that the federal prohibition applies to taxes other than net income taxes. Therefore, the SBT arguably is unaffected by section 381.

22 Wayne L. R. at 1170.

The Department's initial position, as Mr. Opper observed, was that PL 86-272 did not apply. Mr. Opper explained:

> The position of the Department of Treasury (Department) on the issues of nexus and the application of section 381 is stated in question number five of volume V of the Single Business Tax Questions and Answers (June 15, 1976), as follows:
>
> Q. Will the Department use the same criteria for interstate commerce that was used in determining nexus for Michigan income tax jurisdiction?
>
> A. We conclude that as the SBT is not a net income tax or measured by net income, that [15 U.S.C. § 381 (1976)] will not be used to determine nexus. The Department will follow the guidelines set forth in the Scripto v. Carson Case wherein solicitation in the State by employees, brokers or independent representatives would subject the taxpayer to the SBT. We would be limited by the National Bellas-Hess Case in that out-of-state mail order activities would not be subject to the SBT.

22 Wayne L. R. at 1170-1171.

On March 24, 1978 the Department issued SBT Bulletin 1978-3 entitled "Jurisdictional Standard". For imposi-

tion of the tax upon out-of-state businesses, the 1978 bulletin provided:

> (b) Nexus - The single business tax, being determined as a tax other than a net income tax or a tax measured by net income, removes the single business tax from the federal limitation on state taxes known as P.L. 86-272 (1959).
>
> ***
>
> With the enactment of the single business tax, Michigan's jurisdiction will be based on the pre P.L. 86-272 era, e.g., the same nexus standards developed in the landmark decision of Northwestern States Portland Cement Co. vs. Minnesota and Williams V. Stockham Valves & Fittings, Inc., 358 U.S. 450, 79 S. Ct. 357.

In contrast, for the throwback sales situation SBT Bulletin 1978-3 used PL 86-272. The bulletin stated:

> A Michigan taxpayer can apportion tax base if subject to one of the enumerated taxes in Sec. 42. However, if the taxpayer is protected by the federal limitations of PL 86-272, the taxpayer can not apportion tax base. A Michigan tax-

> payer remitting tax to another state is prima facie evidence that the taxpayer is taxable both within and without this state.

On May 1, 1980, the Department issued SBT Bulletin 1980-1 entitled "Jurisdictional Standard." (Petitioner's Appendix at 181-185). This second bulletin indicated that the Department would use cases decided under PL 86-272 as a guide to determine (1) whether an out-of-state business had sufficient nexus with Michigan for imposition of the SBT and (2) whether a Michigan taxpayer was taxable in another state pursuant to section 42 of the Single Business Tax Act (SBTA).

There were essentially two reasons for the second bulletin. First, the nexus standards for both situations were

made uniform. Secondly, it was believed that Congress in enacting PL 86-272 incorporated the minimum nexus standards enunciated in Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450; 79 S. Ct. 357; 3 L. Ed. 2d 421 (1959). Moreover, because the SBT was a business tax similar to net income taxes and franchise taxes imposed upon net income and also used the same three factor apportionment formula, it was more appropriate to use the nexus standard of Northwestern Portland Cement as incorporated in PL 86-272 rather than the standards in Scripto which involved the use tax collection duty. Until this Court's decision in Wisconsin Department of Revenue v. William Wrigley, Jr., 505 U.S. ___; 112 S. Ct. 2447; 120 L. Ed. 2d 174 (1992), it was not clear that PL

86-272 was a step back from the nexus standard suggested in Northwestern Portland Cement.

Because PL 86-272 was more restrictive on Michigan's jurisdiction to impose the SBT than Scripto, no foreign corporations, including Gillette, argued that the Department was using the wrong nexus standard. However, in regards to the throwback sales situation several taxpayers challenged the Department's use of PL 86-272.

Although Gillette claims that it was surprised by the Court of Appeals analysis of the proper nexus standard, the question concerning the applicability of PL 86-272 to the SBT was well known. The first appellate court decision concerning the nexus standard was the

Michigan Court of Appeals decision in Amway Corp. v. Dep't of Treasury, 176 Mich. App. 285; 438 N.W.2d 904 (1989); vacated and remanded 433 Mich. 908 (1989). In Amway the Michigan Court of Appeals applied PL 86-272 and Complete Auto Transit, Inc. v. Brady, 430 U.S. 274; 97 S. Ct. 1076; 51 L. Ed. 2d 326 (1977), as the nexus standard for the throwback sales situation.

Unfortunately, the Michigan Court of Appeals decision in Amway did not resolve the nexus problem. On November 29, 1989, the Michigan Supreme Court vacated and remanded the Amway case. In its order the Michigan Supreme Court stated:

> In lieu of granting leave to appeal, that part of the Court of Appeals judgment which addresses the sales factor under MCL 208.51; MSA 7.558(51) is vacated, and the case

> is remanded to the Court of Appeals for reconsideration, limited to the issue whether the department correctly considered Amway Kentucky sales as Michigan sales in light of Tyler Pipe Industries, Inc v Washington Dep't of Revenue, 483 US 232 (1987). MCR 7.302(F)(1). The Court is to entertain supplemental and other briefing on whether solicitation as a nexus was preserved for appeal, whether PL 86-272 has any application to this case, and the effect of any nexus standard on the constitutionality of § 3(2) of the Single Business Tax Act.

(emphasis added). 433 Mich. at 908.

In Amway, the parties subsequently dismissed the appeal in the Court of Appeals. However, this case was pending in the Michigan Court of Appeals when the Michigan Supreme Court vacated and remanded Amway.

On the same day that the Michigan Court of Appeals decided this case, it also issued its opinion in the case of

Guardian Industries Corp. v. Dep't of Treasury, 198 Mich. App. 363; 499 N.W.2d 346 (1993). In Guardian, which involved the throwback sales issue, the Michigan Court of Appeals concluded that PL 86-272 was not applicable. The Michigan Court of Appeals wrote:

> Public Law 86-272 does not prevent a state from levying taxes listed under § 42 of the SBTA which are not imposed on or measured by net income. Eligible taxes include a franchise tax on the privilege of doing business, a business privilege tax or a corporate stock tax. MCL 208.42; MSA 7.558(42). Therefore, we conclude that § 381 does not provide the minimum nexus standard appropriate for determining whether foreign states' taxation of plaintiffs would violate the due process or the interstate commerce clauses.

(emphasis added). 198 Mich. App. at 372-373.

This is the historical milieu in which this case was litigated. Until

this Court's decision in 1992 in Wrigley, it was the Department's position that PL 86-272 established the minimum nexus standards for constitutional due process. Guardian, supra, 198 Mich. App. at 371. After Wrigley, however, the Department's argument that PL 86-272 incorporated and was co-extensive with the minimum nexus standard suggested in Northwestern Portland Cement was no longer viable. In Wrigley, this Court held that PL 86-272 was a retreat from the nexus standard suggested in Northwestern Portland Cement.

B. The Gillette Litigation

The litigation concerning Gillette's Michigan SBT liability has been ongoing for more than 12 years. On October 1,

1982, the Michigan Department of Treasury issued Final Assessment No. B317249 against The Gillette Company for SBT taxes, penalty and interest for the taxable year 1976. Pursuant to Michigan law, The Gillette Company appealed the final assessment to the Michigan Tax Tribunal without paying any of the tax, penalty or interest. Subsequently, the Department issued two other final assessments (C087970 and C053035) against The Gillette Company for SBT tax, penalty and interest for the years 1977 through 1981. Gillette also appealed those assessments to the Michigan Tax Tribunal, and the three cases were consolidated. To this date Gillette has not paid any SBT taxes for the years 1976 through 1981.

After discovery and after Gillette had requested and received four adjournments of the hearing, the hearing was held in the Michigan Tax Tribunal from March 23, 1987 through April 2, 1987. There were eight days of actual hearing which produced 1,204 pages of transcript and approximately 50 exhibits.

1. Gillette's Activities in Michigan

The Tax Tribunal issued its Opinion and Judgment on February 13, 1989. In its Opinion and Judgment the Michigan Tax Tribunal made extensive findings of fact concerning Gillette's activities in Michigan (Petitioner's Appendix at 206-213). Among the findings of fact of the Tax Tribunal were the following:

> During 1976, Gillette employed 18 full-time salesmen and 22 part-time merchandisers in Michigan. The

> salesmen were provided with rented automobiles and a car trunk inventory of select Gillette products. The salesmen's duties included taking orders for merchandise, replacing defective merchandise and reviewing dealer displays for proper setting to promote saleability. The car trunk inventory of select Gillette products included promotional items and some replacement merchandise. The merchandiser's function included placement of products on customer shelves and keeping management aware of product needs for inventory management.

Petitioner's Appendix at 207.

> Distribution by salesmen during solicitation included samples, displays, free goods, selling aids, promotional material and complimentary merchandise. During the period 1977 through 1981, the Petitioner employed 18 full-time and 14 part-time employees in Michigan.

Petitioner's Appendix at 208.

> Gillette North America had one full-time employee during 1980 and 1981 who held the position of senior district merchandising manager. This merchandising manager had a position outline which was included in Respondent's Exhibit R-16. Duties of the senior district merchandising manager included:

2. To develop action plans to correct retail problems and to advise division management;

***

10. To audit replacement merchandise from merchandisers, and return replaced merchandise to Boston for credit.

Petitioner's Appendix at 208-209.

The senior district merchandising manager was a Dearborn, Michigan resident.

The Safety Razor Division had four full-time employees in Michigan. All were classified as sales representatives. The district sales manager in charge of this group of salesmen was located in the State of Illinois.

The Personal Care Division of Gillette averaged seven full-time employees in Michigan during 1977-981. Six of the seven were classified as sales representatives, and the remaining person was the district sales manager who had an office in Toledo, Ohio, but performed most of his duties in Michigan and resided in Michigan.

Petitioner's Appendix at 209.

The Paper Mate Division of Gillette averaged four employees in Michigan

during 1979-1981. All four employees were classified as sales representative and supervised by a district manager located in the State of Illinois. The district manager performed administrative duties in and outside of Michigan.

Petitioner's Appendix at 210.

Braun North America of Gillette had one employee in Michigan for 1977-1981, a sales representative who solicited sales of expensive cameras at various retailers.

Property of the Gillette divisions located in Michigan included samples, free goods and some replacement merchandise. This was included in the trunk inventory kept by salesmen and located in the leased cars provided to the salesmen by Gillette. Display racks were provided to customers by Gillette. Gillette did not retain title to these display racks upon issuance to a customer and, according to Petitioner, the cost of these display racks was expensed in full on the books of the corporation but was required for tax purposes by the Internal Revenue Service to be amortized over a two-year period.

Petitioner's Appendix at 210.

In 1981, Gillette obtained a Motor Carrier Diesel Fuel Tax License from

> the State of Michigan for the purpose of operating a commercial motor vehicle in Michigan. This license enabled an individual or business to travel in Michigan as a motor carrier and to receive a six cent per gallon discount on the purchase of diesel fuel. Gillette received $35.75 as a rebate on diesel fuel tax paid for the year 1981. A total of 9,265 miles were traveled by the commercial vehicle registered by Gillette in the State of Michigan during 1981 based on Motor Carrier Diesel Fuel tax returns filed.

Petitioner's Appendix at 211.

> Damaged and defective merchandise is eventually returned to Gillette for replacement or adjustment. The larger client or customer is allowed to handle this problem at its own place of business. The sales representative of Gillette will check over the damaged or defective merchandise, send a list to the home office for approval and a credit voucher, and require the customer to destroy the damaged or defective merchandise. There are some accounts, such as Kroger's, that require the sales representative to replace the damaged or defective goods from the car trunk inventory.

Petitioner's Appendix at 212.

> The salesmen negotiate Retail

> Advertising Display Agreements on Gillette's behalf. This agreement is signed by the customer and the salesman for the purpose of providing an incentive for promotion of certain Gillette products. A display allowance is granted if the customer advertises during the promotion period as agreed.

Petitioner's Appendix at 213.

Gillette's sales to customers in Michigan varied from $21,000,000 in 1976 to $34,000,000 in 1981. The amount of Gillette's payroll for Michigan employees ranged from $345,000 in 1978 to $478,000 in 1981. Petitioner's Appendix at 211.

On March 5, 1989, Gillette filed a Motion for Rehearing of the Tax Tribunal's decision. On June 12, 1989, the Tax Tribunal issued its Order Denying Motion for Rehearing. Gillette filed its Claim of Appeal with the

Michigan Court of Appeals on June 23, 1989.

In the Michigan Court of Appeals Gillette again raised issues concerning nexus and administrative procedures. Additionally, Gillette questioned the procedures in the Tax Tribunal. The Court of Appeals issued its Opinion on March 1, 1993. Petitioner's Appendix at 1-18.

2. The Michigan Court of Appeals Decision

In its opinion the Michigan Court of Appeals explained that it was required to accept the factual findings of the Tax Tribunal as long as they were supported by competent, material and substantive evidence on the whole record (Petitioner's Appendix at 4). The

Michigan Court of Appeals also noted the following general facts:

> Petitioner, a Delaware corporation, with its base of operations in Boston, Massachusetts, is a manufacturer and wholesaler of personal care products, razors and ballpoint pens. During the period in question, petitioner maintained a sales staff that called on customers in Michigan. The sales representatives took orders from customers and submitted them to the main office, review customers' displays and shelving arrangements of Gillette merchandise, informed customer of promotions offered by petitioner and replaced defective merchandise.

Petitioner's Appendix at 3-4.

> In the present case, not only did petitioner have a sales staff of at least eighteen full-time sales representatives located in Michigan, it had an ownership interest in promotional and replacement merchandise located in Michigan, leased automobiles for its sales representatives in Michigan and had substantial sales in Michigan generated by the sales staff. Accordingly, we conclude that the single business tax imposed in this case was applied to an activity having a substantial nexus to this state. Scripto, supra; Caterpillar, supra, 417.

Petitioner's Appendix at 13.

On March 22, 1983, Gillette filed a Motion for Rehearing. The Michigan Court of Appeals denied the motion on May 18, 1993. Petitioner's Appendix at 68.

In the Michigan Court of Appeals, while neither party questioned the Department's use of the cases decided under PL 86-272 as a guide for determining nexus, Gillette was aware that PL 86-272 might not be the appropriate nexus standard. In its original brief in the Michigan Court of Appeals (Appellant's Brief dated 11-12-89), Gillette argued that the Tax Tribunal erred in applying a different nexus standard. Gillette's original brief in the Michigan Court of Appeals stated:

VII. ONCE THE DEPARTMENT ADMITTED THAT IT HAD UNIFORMLY APPLIED THE PL 86-272 TEST FOR TAXABLE STATUS IN ALL YEARS AT ISSUE, THE TRIBUNAL ERRED BY APPLYING A DIFFERENT STANDARD TO DETERMINE WHETHER GILLETTE WAS TAXABLE IN MICHIGAN FOR THE YEARS 1976-1979.

Gillette, Original Brief, Michigan Court of Appeals, p. 49.

Gillette filed its Application For Leave to Appeal with the Michigan Supreme Court on June 9, 1993. In its application Gillette complained about the application of the Due Process/ Commerce Clause nexus standard clarified in Quill Corp. v. North Dakota, 504 U.S. ___; 112 S. Ct. 1904; 119 L. Ed. 2d 91 (1992), instead of PL 86-272. In responding to the application for leave to appeal, the Department maintained that Gillette's application lacked any merit because Gillette's activities in Michigan exceeded both nexus standards.

On April 19, 1994, the Michigan Supreme Court denied Gillette's application for leave to appeal (Petitioner's Appendix at 144). Gillette then filed a Motion For Reconsideration. On July 29, 1994, the Michigan Supreme Court denied Gillette's motion for reconsideration. Petitioner's Appendix at 177-178.

On August 31, 1994, after the Michigan Supreme Court denied Gillette's application for leave to appeal, Gillette filed a Complaint for Injunctive Relief in the United States District Court for the Eastern District of Michigan (USDC Docket No. 94-DT-73427-CV). The complaint sought to enjoin the Treasurer of the State of Michigan and the Michigan Commissioner of Revenue from collecting the SBT

assessments which the Michigan Court of Appeals had affirmed. On September 15, 1994, the U.S. District Court dismissed Gillette's complaint based upon the Federal Tax Injunction Act, 28 U.S.C. § 1341.

Gillette immediately filed an appeal with the United States Court of Appeals for the Sixth Circuit (Docket No. 94-2022) and filed a motion for stay or injunction pending appeal. The Sixth Circuit Court of Appeals denied Gillette's motion. Gillette then filed a Motion For Reconsideration which is still pending before the Sixth Circuit.

REASONS FOR DENYING THE WRIT

This case does not present an important question of federal law, nor does it involve a decision concerning federal law which conflicts with decisions of this Court. The question of what nexus standard should be applied is essentially moot because Gillette's activities in Michigan exceeded both nexus standards. Secondly, Gillette is not claiming that its activities in Michigan lacked substantial nexus under the proper nexus standard. Thirdly, the question of whether a state court corrects an inappropriate administrative nexus standard and applies the correct nexus standard retroactively to a pending litigant is a question of state law. Fourth, to the extent that questions of

federal law are implicated, the action of the Michigan Court of Appeals in applying the Due Process/Commerce Clause nexus standard retroactively to a pending litigant is in accordance with the decisions of the Court. Harper v. Virginia Dep't of Taxation, 509 U.S. ___; 113 S. Ct. 2510; 125 L. Ed. 2d 74 (1992).

Finally, this is not a case of selective prospective application. The Michigan Court of Appeals did not state that its opinion in either Gillette or Guardian should be applied prospectively to any taxpayer. Moreover, as indicated in Gillette's Appendix to its Writ, pages 237 and 239, the Department is applying the Michigan Court of Appeals decision retroactively to other taxpayers.

A.

GILLETTE SATISFIES THE DUE PROCESS/ COMMERCE CLAUSE NEXUS STANDARD APPLIED BY THE MICHIGAN COURT OF APPEALS.

In its application for leave to appeal to the Michigan Supreme Court (Petitioner's Appendix at 69), Gillette readily acknowledged that it satisfied the Due Process/Commerce Clause nexus standard applied by the Michigan Court of Appeals. On page 7 of its application for leave (Petitioner's Appendix at 92), Gillette stated:

> The Opinion next proceeded to determine whether there was sufficient nexus in Michigan to constitutionally apply the SBT to Gillette. It relied heavily upon the Supreme Court's recent "nexus" opinion in Quill Corp v North Dakota, 504 US ____; 112 S Ct 1904; 119 L Ed 2d 91 (1992), concluding under the Due Process and Commerce Clause tests, that Gillette's activities were sufficient to permit Michigan to constitutionally impose the SBT during each of the years at issue. (This conclusion was never at issue, and

would have been admitted by both parties.)

(emphasis added).

B.

THE DECISIONS OF THE MICHIGAN COURT OF APPEALS AND THE MICHIGAN TAX TRIBUNAL ALSO INDICATE THAT GILLETTE'S ACTIVITIES IN MICHIGAN EXCEEDED THE ACTIVITIES PROTECTED BY PUBLIC LAW 86-272.

On June 19, 1992, this Court issued its decision in Wrigley, supra, in which the Court for the first time interpreted the meaning of solicitation contained in PL 86-272. In interpreting the meaning of "solicitation", this Court adopted a middle ground between the parties' polarized positions, and articulated the proper standard as being one which draws the line "between those activities that are entirely ancillary to requests for purchases - those that serve no independent business function apart from

their connection to the soliciting of orders - and those activities that the company would have reason to engage in anyway but chooses to allocate to its in-state sales force." 120 L. Ed. 2d at 189. In Wrigley, this Court determined that the following activities were protected solicitation: (1) in-state recruiting, training and evaluation of sales representatives; (2) in-state use of hotels and homes for sales-related meetings, and (3) its in-state contacts concerning credit disputes. 120 L. Ed. 2d at 193. In contrast the Court concluded that the following activities were not ancillary and therefore exceeded solicitation: (1) the replacement of stale gum; (2) the supplying of gum through agency stock checks; and (3) the storage of gum. 120 L. Ed. 2d at 192-193.

Although the opinion of the Michigan Court of Appeals did not state the facts with any depth, the facts which it stated indicated that Gillette's activities exceeded those protected by PL 86-272.

1. Replacement of Defective and Damaged Merchandise.

On page 1 of its opinion the Michigan Court of Appeals stated:

> The sales representatives took orders from customers and submitted them to the main office, review customers' displays and shelving arrangements of Gillette merchandise, informed customers of promotions offered by petitioner and replaced defective merchandise.

(emphasis added). Petitioner's Appendix at 4.

The replacement of defective or damaged merchandise by Gillette's employees

in Michigan clearly exceeds the activities protected by PL 86-272. In Wrigley this Court stated:

> We conclude that the replacement of stale gum, the supplying of gum through "agency stock checks," and the storage of gum were not ancillary. As to the first: Wrigley would wish to attend to the replacement of spoiled product whether or not it employed a sales force. Because that activity serves an independent business function quite separate from requesting orders, it does not qualify for § 381 immunity. Miles Laboratories, 274 Ore, at 400, 546 P.2d, at 1083. Although Wrigley argues that gum replacement was a "promotional necessity" designed to ensure continued sales, Brief for Respondent 31, it is not enough that the activity facilitate sales; it must facilitate the requesting of sales, which this did not.

120 L. Ed. 2d at 192.

In its opinion the Michigan Tax Tribunal had also found that Gillette's employees in Michigan engaged in the replacement of defective or damaged

merchandise. On page 7 of its Opinion and Judgment the Tax Tribunal made the following findings of facts:

> Damaged and defective merchandise is eventually returned to Gillette for replacement or adjustment. The larger client or customer is allowed to handle this problem at its own place of business. The sales representative of Gillette will check over the damaged or defective merchandise, send a list to the home office for approval and a credit voucher, and require the customer to destroy the damaged or defective merchandise. There are some accounts, such as Kroger's, that require the sales representative to replace the damaged or defective goods from the car trunk inventory.

(emphasis added). Petitioner's Appendix at 212.

Additionally, the Tax Tribunal concluded:

> We conclude that Petitioner went beyond the definition of solicitation while conducting its business activities within the State of Michigan. The following activities by the Petitioner support that conclusion:

1. Salesmen had supplies of Gillette products in the trunks of their leased cars, which were used to replace damaged or returned property;

Petitioner's Appendix at 222.

The record in this matter, including exhibits and testimony, supported the Tax Tribunal's findings and indicated that Gillette's employees regularly and routinely replaced defective or damaged merchandise or verified damaged or defective merchandise.

In addition to the replacement of defective or damaged merchandise, there were other activities of Gillette which exceeded the activities protected by PL 86-272.

2. Actual Sales, Not Solicitation, During the Tax Years 1976 Through 1978.

Making actual sales is not a protected activity. Wrigley, 120 L. Ed. 2d

at 189, n. 5. In its findings of fact the Tax Tribunal indicated that in 1976 Gillette had taxable sales in the amount of $46,870.00 (Petitioner's Appendix at 208). This conclusion was also supported by evidence in the record. The Department of Treasury conducted a sales tax audit of Gillette for the years 1974 through 1978. In the audit the auditor determined that Gillette made actual sales in Michigan for all of the years, including 1976 through 1978. These amounts were not de minimis. As indicated on the audit report, the amount of the gross sales was $213,121 in 1976, $262,333 in 1977 and $143,269 in 1978. Equally important, the audit report indicated that Gillette was filing sales tax returns and reporting taxable sales for the years 1976 through 1978.

3. The Retail Advertising/Display Agreements.

In Wrigley this Court noted that Wrigley engaged in print, radio and television advertising in Wisconsin. However, "the purchase and placement of that advertising was managed by an independent advertising agency located in Chicago." 120 L. Ed. 2d at 183.

In this case the Michigan Tax Tribunal concluded that the sales representatives in Michigan were actively engaged in advertising activities. On page 8 of the Opinion and Judgment, the Tax Tribunal stated:

> The salesmen negotiate Retail Advertising Display Agreements on Gillette's behalf. This agreement is signed by the customer and the salesman for the purpose of providing an incentive for promotion of certain Gillette products. A display allowance is granted if the customer advertises during the promotion period as agreed.

(emphasis added). Petitioner's Appendix at 213.

The record supported the Tax Tribunal's conclusion. A copy of the Retail Advertising/Display Agreement was included in the record as Exhibit R-51. The Retail Advertising/Display Agreement indicated that the sales representative played an integral role in the execution and performance of the agreement between the customers and Gillette. Under the terms of agreements the sales representative had authority to approve advertising. The customer submitted the Advertising/Display Agreement to the Gillette sales representative no later than 30 days after the performance date. The agreement provided a space for the customer's signature and the Gillette's salesman's signature.

Most importantly, the Retail Advertising/Display Agreement provided for the payment of an allowance from Gillette to the customers. Under Part III of the Agreement, the terms provided:

> Payment of advertising/display allowances will be made by check directly to customers providing the following are performed:

The first condition was that the agreement was to be submitted to the sales representative. The agreement stated:

> A. Advertising/Display Agreement must be submitted to the Gillette Sales Representative no later than 30 days after final performance date as noted on reverse side of this contract.

4. Activities of Merchandisers.

In regards to the merchandisers, the Michigan Tax Tribunal stated in its

Opinion and Judgment:

> 2. In 1976, Petitioner employed 22 part-time merchandisers. These merchandisers faced and dusted merchandise, proportioned all racks, shelves and displays, replaced damaged merchandise, etc. (see Exhibit R-16). During 1977-1981, Petitioner employed a district manager and salesmen who performed activities which included merchandisers' functions, but no merchandisers were employed in 1977;

Petitioner's Appendix at 222.

The merchandisers were not involved in the actual solicitation of sales. Their duties included:

a. Face and dust merchandise.

b. Properly proportion all racks, shelves and displays.

c. Price and pack out merchandise.

d. Replace reasonable quantities of damaged and unsalable merchandise.

e. Build and maintain displays.

f. Utilize "POP" material where authorized.

g. Inventory items for which an order will be requested.

Under Wrigley most of these activities appear to be ancillary to solicitation. However, as discussed above, the replacement of damaged and defective merchandise exceeds the solicitation of sales.

5. The Operation of a Commercial Vehicle.

In regards to the operation of commercial vehicles in Michigan, the Michigan Tax Tribunal Opinion and Judgment stated:

> In 1981, Gillette obtained a Motor Carrier Diesel Fuel Tax License from the State of Michigan for the purpose of operating a commercial motor vehicle in Michigan. This license enabled an individual or business to travel in Michigan as a motor carrier and to receive a six cent per gallon discount on the purchase of diesel fuel. Gillette received $35.75 as a rebate on diesel fuel

> tax paid for the year 1981. A total of 9,265 miles were traveled by the commercial vehicle registered by Gillette in the State of Michigan during 1981 based on Motor Carrier Diesel Fuel tax returns filed.

Petitioner's Appendix at 211.

As indicated by the Michigan Tax Tribunal, for the year 1981 Gillette filed quarterly Motor Carrier Diesel Fuel Tax returns, reporting the amount of diesel fuel used in the operation of its commercial motor vehicles in Michigan. The quarterly Motor Carrier Diesel Fuel Tax returns indicated that the Gillette Company used and operated a licensed commercial vehicle for the following amount of miles in Michigan during 1981:

Quarter	Miles in Michigan
January-March	1600
April-June	2471
July-September	2957
October-December	2237

The record did not indicate what the commercial vehicle was used for, and Gillette did not offer any testimony concerning the commercial vehicle.

In summary the activities of Gillette were similar to the activities of Wrigley. Gillette, like Wrigley, engaged in some activities which are ancillary to solicitation. However, like Wrigley, Gillette clearly engaged in other activities which are not protected by PL 86-272.

C.

THE MICHIGAN COURT OF APPEALS' DECISION DETERMINING THAT THE SINGLE BUSINESS TAX WAS NOT A NET INCOME TAX AND APPLYING THE PROPER NEXUS STANDARD TO THE SINGLE BUSINESS TAX IS A QUESTION OF STATE LAW.

This is not a case in which the taxpayer is claiming that as a matter of

constitutional law the wrong nexus standard was applied and that its activities do not satisfy the constitutional nexus standard. Gillette has acknowledged that it has substantial nexus with Michigan. Gillette's claim is simply that the Michigan Court of Appeals should have continued to apply the erroneous administrative nexus standard instead of the Due Process/Commerce Clause nexus standard.

The determination that the SBT was not a net income tax is initially a question of state law. Moreover, the decision of the Michigan Court of Appeals to correct the administrative interpretation and apply the proper nexus standard to a pending litigant is also a question of state law and does

not raise an important question of federal law. When questions of state law are at issue, state courts have the authority to determine the retroactivity of their decisions. Great Northern R. Co. v. Sunburst Oil & Refining Co., 287 U.S. 358, 364; 53 S. Ct. 145; 77 L. Ed. 360 (1932).

In Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673; 50 S. Ct. 451; 74 L. Ed. 1107 (1930), this Court stated:

> It is true that the courts of a state have the supreme power to interpret and declare the written and unwritten laws of the state; . . . .

281 U.S. at 680.

This is exactly what the Michigan Court of Appeals was doing--declaring

that the SBT was not a net income tax and that, accordingly, PL 86-272 was not applicable to the SBT.

Gillette was well aware of the controversy concerning the appropriate nexus standard. Contrary to Gillette's claim in its Petition For Writ of Certiorari, Gillette did discuss the question of the application of the Due Process/Commerce Clause standard instead of PL 86-272. In its original brief in the Michigan Court of Appeals (Appellant's Brief dated November 12, 1989), Gillette argued that the Tax Tribunal erred in applying a different nexus standard. Argument VII of Gillette's original brief in the Court of Appeals stated:

> VII. ONCE THE DEPARTMENT ADMITTED THAT IT HAD UNIFORMLY APPLIED THE PL 86-272 TEST FOR TAXABLE STATUS IN

ALL YEARS AT ISSUE, THE TRIBUNAL ERRED BY APPLYING A DIFFERENT STANDARD TO DETERMINE WHETHER GILLETTE WAS TAXABLE IN MICHIGAN FOR THE YEARS 1976-1979.

D.

THE MICHIGAN COURT OF APPEALS' RETROACTIVE APPLICATION OF THE PROPER NEXUS STANDARD IS SUPPORTED, IF NOT MANDATED, BY DECISIONS OF THIS COURT.

The application of the Due Process/Commerce Clause nexus standard, clarified in Quill, supra, to Gillette does not violate Due Process or Equal Protection. Although Gillette maintains that the Due Process/Commerce Clause nexus standard should not be applied in this case, in Harper, supra, this Court mandated the retroactive application of its decisions concerning federal law to "all cases still open on direct review . . . ." 125 L. Ed. 2d at 86. After

this Court's decision in Wrigley, the Department's position concerning PL 86-272 was no longer viable. Accordingly, when the Michigan Court of Appeals determined that PL 86-272 was inapplicable to the SBT and that the appropriate nexus standard was the Due Process/Commerce Clause nexus standard, it was appropriate for the Michigan Court of Appeals to apply that standard to all pending cases. Indeed, it would have been contrary to Harper for the Michigan Court of Appeals to apply the Due Process/Commerce Clause nexus standard in Guardian, which was decided the same day as the Gillette case, but not apply it in this matter.

The longstanding rule of law in Michigan also favors retroactive appli-

cation of decisions. Placek v. Sterling Heights, 405 Mich. 638, 664; 275 N.W.2d 511 (1979), Donohue v. Russell, 264 Mich. 217, 219; 249 N.W. 830 (1933).

E.

RETROACTIVE APPLICATION OF THE PROPER NEXUS STANDARD DOES NOT VIOLATE DUE PROCESS OR EQUAL PROTECTION.

In James B. Beam Distilling Co. v. Georgia, 501 U.S. ___; 111 S. Ct. 2439; 115 L. Ed. 2d 481 (1991), and again in Harper, this Court repudiated the theory of selective prospective application; i.e., applying a new rule to the litigants but not to other cases which were still open. Although Gillette claims that it is being denied equal treatment in the retroactive application of the Michigan Court of Appeals decision, there is nothing to substantiate

Gillette's claim. In its decision in the Gillette case and the Guardian case, the Michigan Court of Appeals did not limit the application of its decisions prospectively to other taxpayers. Indeed, in a subsequent unpublished opinion, the Michigan Court of Appeals did apply the Due Process/Commerce Clause nexus standard in an open case involving the years 1979 through 1981 even though the Department and the Tax Tribunal had applied PL 86-272. Michigan Chrome and Chemical v. Dep't of Treasury, Court of Appeals Docket No. 137977 (1/4/94); 2 CCH Mich. Tax Rep. ¶ 400-322, pp. 31.433-31.434.

Moreover, as the appendices to Gillette's Petition For Writ of Certiorari demonstrate, the Department

did not apply the Guardian and Gillette decisions prospectively. As indicated in the letters on page 237 and 239 of Gillette's Appendix, the Department sent letters to businesses which had not filed SBT returns for the year "ending in and after 1989". This was four years before the Court of Appeals decisions in Gillette and Guardian.

Gillette's argument that it cannot be treated differently from other businesses for the years 1976 through 1981 concerning what nexus standard was applied has no merit. Due process only requires that Gillette be treated the same as all pending litigants. Harper, 125 L. Ed. 2d at 86. It would violate Due Process for the Department to attempt to apply the Due Process/

Commerce Clause nexus standard to all businesses back to the year 1976. In McKesson Corp. v. Division of Alcoholic Beverages, 495 U.S. ___; 110 S. Ct. 2238; 110 L. Ed. 2d 17 (1990), this Court recognized that retroactive imposition and collection of taxes "beyond some temporal point" "would violate due process by unduly interfering with settled expectations". 495 U.S. at 40-41, fn. 23.

Gillette's alleged reliance upon the erroneous administrative interpretation does not raise Due Process or Equal Protection claims. In Brinkerhoff, supra, this Court noted:

> [T]he mere fact that a state court has rendered an erroneous decision on a question of state law, or has overruled principles or doctrines established by previous decisions on which a party relied, does not give rise to a claim under the Fourteenth

Amendment or otherwise confer appellate jurisdiction on this Court.

(emphasis added). 281 U.S. at 680.

F.

THIS CASE DOES NOT INVOLVE INTENTIONAL, SYSTEMATIC AND ARBITRARY DISCRIMINATION.

In its petition Gillette cites this Court's decision in Iowa-Des Moines National Bank v. Bennett, 284 U.S. 239; 52 S. Ct. 133; 76 L. Ed. 265 (1931). Despite Gillette's claims to the contrary, this case, unlike the Iowa-Des Moines case, does not involve intentional, systematic and arbitrary discrimination. In Iowa-Des Moines, the Iowa Supreme Court acknowledged that there had been intentional, systematic and arbitrary discrimination. That is not the situation in this matter.

The essence of Gillette's complaint is the retroactive effect which happens to any litigant when a legal precedent or administrative practice is overturned. Obviously, there are persons to whom the new rule of law could not be applied because of the passage of time or because of res judicata. This effect of retroactive application was specifically recognized in Justice Souter's opinion in Beam, supra, in which he explained:

> Of course, retroactivity in civil cases must be limited by the need for finality, see Chicot County Drainage District v Baxter State Bank, 308 US 371, 84 L Ed 329, 60 S Ct 317 (1940); once suit is barred by res judicata or by statutes of limitation or repose, a new rule cannot reopen the door already closed. It is true that one might deem the distinction arbitrary, just as some have done in the criminal context with respect to the distinction between direct review and habeas: . . . .

115 L. Ed. 2d at 492.

The inherent limitations upon the retroactive application of judicial decisions are not grounds for a claim of intentional, systematic and arbitrary discrimination. In Harper this Court specifically recognized that its decisions could only be applied retroactively to "all cases still open on direct review . . . ." 125 L. Ed. 2d at 86. Likewise, in McKesson, supra, this Court recognized that retroactive imposition and collection of taxes was prohibited beyond some temporal point. 495 U.S. at 40-41. As indicated above, the State of Michigan is following both of those decisions.

CONCLUSION

This case does not involve the decision of a state court of last resort which has decided a federal question in a way that conflicts with another state court of last resort or of a United States Court of Appeals. Likewise, this case does not involve an important question of federal law which should be settled by this Court nor does it involve a state appellate court decision which has decided a federal question contrary to decisions of this Court.

What this case does involve is a case in which the taxpayer's business activities in Michigan clearly exceeded any nexus standard, PL 86-272 or the Due Process/Commerce Clause nexus standard. What this case does involve is a deci-

sion of the Michigan Court of Appeals in which the Court of Appeals determined that the nexus standard used by the tax administrators, PL 86-272, was no longer viable based upon decisions of this Court and in which the Court of Appeals applied the proper nexus standard. Gillette is not claiming that the Due Process/Commerce Clause is not the proper standard, nor is Gillette claiming that it did not have "substantial nexus" in Michigan.

Equally important, the action of the Michigan Court of Appeals in retroactively applying the proper nexus standard to all open cases, i.e., Gillette and Guardian, is in accordance with the decisions of this Court. For all of these reasons, Respondent requests that

the Petition For Writ of Certiorari be denied.

Respectfully submitted,

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In The
Supreme Court of The United States
October Term 1994

THE GILLETTE COMPANY,
Petitioner,

v.

MICHIGAN DEPARTMENT OF TREASURY,
Respondent.

On Petition For A Writ Of Certiorari To The Michigan Court of Appeals

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PETITIONER'S REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION

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REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

With few exceptions, the arguments of Respondent, the Michigan Department of Treasury ("Department"), either miss or avoid the issues raised by the Petitioner, The Gillette Company ("Gillette"). A reply to several of its new arguments, pursuant to Rule 15.6, is therefore necessary.

A. The Department's Assertion That "Due Process" Only Requires That Gillette Be Treated The Same As "All Pending Litigants" Is Wrong

The Department states, at p 53 of its Brief for Respondent in Opposition ("Brief"),

> "Gillette's argument that it cannot be treated differently from other businesses for the years 1976-1981 concerning what nexus standard was applied has no merit. Due Process only requires that Gillette be treated the same as all pending litigants. Harper, 125 L.Ed.2d at 86." (Emphasis added)

This assertion by the Department is critical to its attempt to justify the State's unconstitutional enforcement of a

different Single Business Tax ("SBT") jurisdictional standard against Gillette. This is so because the Department admits, at p 54 of its Brief, that it cannot constitutionally apply the new jurisdictional standard to others similarly situated. Here, Gillette and the Department agree. If the Department is constitutionally required to apply the same SBT jurisdictional test to all similarly situated persons for the years here at issue, it cannot do so.

The Department, in asserting that it need only apply the decision of this Court retroactively with respect to other pending litigants, misreads Harper v. Virginia Dept. of Taxation, 509 U.S. ____, 113 S.Ct. 2510 (1993).[1] Justice Thomas' Opinion in

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[1]The Department again misreads Harper at p 57 of its Brief, in stating,

> "In Harper, this Court specifically recognized that its decisions could only be applied retroactively to "all cases still open on direct review. . .".

Harper did not hold that equal protection requires this Court's decision be applied only to other pending litigants. Retroactive application must also apply to persons who could, consistent with applicable state practice and procedure, become parties litigant (Id., 2516-18).

Clearly, even if applicable here by analogy, this Court's recent decisions on the retroactive effect of its opinions dealing with the constitutionality of state laws have been misread by the Department.[2]

The Department also attempts to rely upon what it perceives to be "inherent

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[2]In James B. Beam Distributing Co. v. Georgia, 501 U.S. ___, 111 S.Ct. 2439, 115 L.Ed.2d 481, 488 (1991), Justice Souter, explaining how a fully retroactive decision would be applied, stated,

> "First, a decision may be made fully retroactive, applying both to the parties before the Court and to all others by and against whom claims may be pressed, consistent with res judicata, and procedural barriers such as statutes of limitations. This practice is overwhelmingly the norm." (Emphasis added)

Subsequently, at p 493, Justice Souter refused to distinguish between the application of a Supreme Court decision to parties litigant and to others who had not yet become parties litigant.

limitations upon the retroactive application of judicial decisions." Such "inherent limitations" are established by statutes of limitations and by the doctrine of res judicata. Neither of these "inherent limitations" is applicable in the instant case."

B. **The Issues Raised by Gillette Involve Gillette's Constitutional Rights and Are Not, Therefore, Questions of State Law**

The Department argues that correcting an "administrative interpretation" and applying "the proper nexus standard" to a pending litigant, are questions of state law. It asserts that the State therefore has the authority to determine the retroactivity of its court's decisions (Department's Brief, pp 46-47).

The response is simple. Obviously, the State can determine the extent its courts' decisions are to be given retroactive effect. But it cannot in doing so

ignore rights protected under the Federal Constitution. This Court in Beam (115 L.Ed.2d at 487-488), through Justice Souter, clearly stated that there are federal constitutional restrictions upon the "backward" application of a state judgment. The Court noted,

> Once the rule is found to apply 'backward' there may then be a further issue of remedies, i.e., whether the party prevailing under a new rule should obtain the same relief that would have been awarded if the rule had been an old one. Subject to possible constitutional thresholds, see McKesson Corp v. Florida Alcoholic Beverages and Tobacco Div, 496 US ___, 110 L Ed 2d 17, 110 S Ct 2238 (1990), the remedial inquiry is one governed by state law, at least where the case originates in state court." (Emphasis added)

It is precisely these "constitutional thresholds" upon which Gillette here premises its petition for a writ of certiorari.

The Court of Appeals knew or should have known that its new jurisdictional test

could not constitutionally be imposed on others similarly situated.

This Court in McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, 496 U.S. 18, 40-41, 110 S.Ct. 2238 (1990), noted that a state could assess and collect back taxes from those favored by an unconstitutional discriminatory tax levy or collection practice, and thereby eliminate the discrimination only ". . . to the extent consistent with other constitutional restrictions. . ." This Court there clearly highlighted the problem with the retroactive imposition of a significant tax burden beyond some "temporal point" which would deny Due Process, and the problem of being unable to assess and collect such a retroactive tax against others similarly situated, which would deny Equal Protection (496 U.S. at 40, fn. 23).

C. The Department Did Not Adopt PL 86-272 As The Applicable SBT Jurisdictional Test By Mistake

One argument advanced by Gillette in its petition for certiorari was that Michigan's longstanding 13-year published administrative policy of using PL 86-272 as its SBT jurisdictional test had become established as the law in Michigan, and, accordingly, Gillette was denied equal protection under this established law by the Court of Appeals' sua sponte adoption of a different and less favorable standard. (Gillette's Petition, pp 12-21) The Department, in an abrupt change of position, now argues for the first time, that it had erroneously adopted and applied its longstanding PL 86-272 jurisdiction policy, and that this "mistake" could be corrected by the Michigan Court of Appeals.[3]

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[3]The Department argues, for example, "Gillette's claim is simply that the Michigan Court of Appeals should have continued to apply the erroneous administrative nexus standard instead of the Due Process/Commerce Clause nexus standard." (Department's Brief, p 36)

Michigan did not, as the Department would now infer, adopt the PL 86-272 administrative jurisdictional policy as the jurisdictional test to be applied only so long as it reflected contemporary Due Process/Commerce Clause nexus standards. This is not what the Michigan Revenue Department Bulletins said. The Department's statements on brief that it believed PL 86-272 reflected the Due Process/Commerce Clause nexus test which the courts would have applied are not supported by the evidence in the record.[4]

Nor is this mutation of the Department's position consistent with its actions. If the Department's assertion as to its intent were true, it would have

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[4]Frederick Lynch, Michigan's SBT Administrator, while discussing the adoption of the PL 86-272 administration policy, testified at trial in this matter, on examination by the State, "PL 86-272 is more restrictive on the State than the court cases set forth in Northwest Portland." (See Gillette's Petition for Writ of Certiorari, App. 251)

submitted appropriate briefs to the Michigan Court of Appeals after this Court's decision in Quill Corp. v. North Dakota, 504 U.S. ___, 112 S.Ct. 1904 (1992), notifying that court that the Department's assumption that PL 86-272 stated the applicable Due Process/Commerce Clause jurisdictional nexus test was incorrect. Quill unequivocally established that the Due Process/Commerce Clause jurisdictional requirements were far more permissive than PL 86-272. The Department did file a second supplemental reply brief after Quill was decided. It never mentioned Quill.

Further, the Department argues at pp 14-15, that

> "Until this Court's decision in 1992 in Wrigley, it was the Department's position that PL 86-272 established the minimum nexus standards for constitutional due process. . . After Wrigley, however, the Department's argument that PL 86-272 incorporated and was coextensive with the minimum nexus standard suggested in

> Northwestern Portland Cement was no longer viable. In Wrigley, this Court held that PL 86-272 was a retreat from the nexus standard suggested in Northwestern Portland Cement."

The Department never raised this argument in the Michigan Courts. The so-called "Department's position" referenced is also contradicted by the circumstances surrounding this appeal. In the Department's reply to Gillette's second supplemental brief in the Michigan Court of Appeals, filed August 21, 1992, the Department analyzed the then recent decision in Wisconsin Dept. of Revenue v. Wrigley Co., 505 U.S. ___, 112 S.Ct. 2447 (1992), handed down after Quill. But the Department did not ask that the longstanding PL 86-272 jurisdictional standard be found to be incorrect, or be changed. Quite the contrary, it continued to ask that PL 86-272 be applied as the applicable jurisdictional test. Indeed the Department, in that brief, recognized that PL 86-272 might protect otherwise taxable

activity, but the Department specifically stated this was not an issue in this appeal (Appendix A, App. 1).

D. **The Department's Brief Confuses the Jurisdictional "Nexus" For The Apportionment Sales Factor "Throw Back" Test With The Jurisdictional "Nexus" Test Required For The Department To Assert Jurisdiction To Tax Under The SBT**

There are two different jurisdictional tests (called "nexus" by the Department) required to be applied in the administration of the SBT Act. The first test at issue here, is applied to determine if the SBT can be imposed on a potential taxpayer from another state. Michigan, by long-standing administrative policy, adopted PL 86-272 as the proper jurisdictional "nexus" test to be uniformly applied.

The second jurisdictional test is applied in determining whether another state could tax a Michigan taxpayer selling and shipping goods to that state. If the other state had no jurisdiction to tax, the

sales to that state were "thrown back" to the numerator of the taxing state's sales factor fraction, increasing the tax base apportioned to that state for taxation.

The Michigan SBT Act provided that the other state would be deemed to have jurisdiction to tax, whether it actually levied a tax or not, if it could have done so under either an income type tax (bringing the PL 86-272 test to bear) or other non-income types of taxes, such as a corporate franchise tax, a business privilege tax, or a single business type tax (MCL 208.42, MSA 7.558(42)). The Department attempted to ignore the alternative tests and looked only to the PL 86-272 jurisdictional test. But Michigan taxpayers succeeded in establishing that Michigan could not by

administrative fiat ignore the Section 42 alternative "throw back test."[5]

The Department unfortunately sometimes fails to distinguish between issues involving the alternative "nexus" (jurisdiction tests) for purposes of the sales factor "throw back" determination, and the "nexus" (jurisdictional test) adopted for purposes of determining Michigan's own jurisdiction to tax.

For example, at p 11 of its Brief, the Department states,

> "Although Gillette claims that it was surprised by the Court of Appeals [sic] analysis of the proper nexus standard, the question concerning the

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[5]Notwithstanding the Department's current argument that it believed PL 86-272 codified the Due Process/Commerce clause tests until the 1992 Wrigley decision, Michigan taxpayers have for many years been arguing that the alternative Due Process/ Commerce Clause constitutional "throw back" jurisdictional test was different and that it is much easier to establish jurisdiction to tax under these test than under PL 86-272. For example, the taxpayers Guardian Industries Corporation and Cargil Incorporated, involved in Guardian Industries Corp v. Dep't. Treasury, 198 Mich. App. 363, 499 N.W.2d 346 (1993), as noted in that opinion, were advancing this proposition with respect to the years 1982-1985 and 1982-1983, respectively.

> applicability of PL 86-272 to the SBT was well known", citing Amway Corp. v. Department of Treasury, 176 Mich. App. 285, 438 N.W.2d 904 (1989) vac and rem 433 Mich. 908 (1989).

The Amway case dealt only with the alternative jurisdictional tests specified by section 42 of the Act.[6]

Subsequently, in an effort to argue that the State had not in fact discriminated against Gillette by subjecting it alone to the new Quill jurisdictional test, the Department states at p 52 of its Brief,

> "[I]ndeed, in a subsequent unpublished opinion, the Michigan Court of Appeals did apply the Due Process/Commerce Clause nexus standard in an open case involving the years 1979 through 1981 even though the Department and the Tax Tribunal had applied PL 86-272. Michigan Chrome and Chemical v. Department of Treasury, Court of Appeals Docket No. 137977 (1/4/94); 2 CCH Mich Tax Rep ¶ 400-322, pp 31.4833-31.434"

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[6]Indeed, the Michigan Supreme Court vacated and remanded with respect to the Court of Appeals' decision holding that solicitation alone could not establish Kentucky jurisdiction to tax. Unfortunately the case was then settled (433 Mich. 908 (1989).

This statement is also misleading. In the unpublished Michigan Chrome opinion, the issue was the "throw back" nexus jurisdictional test, and the court followed its earlier ruling in Guardian, that the Department could not force the taxpayer to look only to the PL 86-272 test, when the statute specifically gave it the alternative of looking to the more easily met Due Process/Commerce Clause test. The state's longstanding administrative policy of applying PL 86-272 to determine its jurisdiction to tax was not at issue, and was not even discussed in that case (Appendix B, App. 5).

E. The Department's Assertion That "Gillette Was Well Aware Of The Controversy Concerning The Appropriate Nexus Standard" Is Also Not True

The Department asserts, at p 48-49 of its Brief, quoting a section heading in Gillette's original brief in the Michigan Court of Appeals,

> "Gillette was well aware of the controversy concerning the appropriate nexus standard. Contrary to Gillette's claim in its petition for writ of certiorari, Gillette did discuss the question of the application of the Due Process/ Commerce Clause standard instead of PL 86-272."

There was never a controversy concerning the appropriate SBT Act jurisdictional ("nexus") standard. The Department's statement is not true. Gillette had informed the Court of Appeals, following the caption quoted by the Department, that there was no issue as to the applicable jurisdictional test (Appendix C, App. 9). In its brief in response, the Department confirmed Gillette's assertion that the PL 86-272 test must be applied, and that there was no controversy over which jurisdictional test to apply (Appendix D, App. 12).

F. The Department's Argument That The Court Of Appeals Was Right For The Wrong Reasons

Over one-third of the Department's Brief is devoted to the unstated proposi-

tion that the decision of the Court of Appeals is right for the wrong reason. The Department argues in the alternative that, had the Court of Appeals addressed this issue, it would have concluded that Gillette's activities in Michigan established SBT jurisdiction under the Department's administrative PL 86-272 jurisdiction policy.[7]

At pp 17-23 and 32-43 of the Department's Brief, the Department argues extensively from the tax tribunal's findings of fact, as to various alleged Gillette activities. The Department fails to note that many of these findings of fact were challenged by Gillette in the Court of

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[7]The Department's Hearing Officer, before whom these issues were raised in informal conference, recommended that the Department conclude that it had no PL 86-272 jurisdiction, and dismiss the SBT assessments (Appendix E, App. 18). She correctly stated, among other reasons, that similar activities by Gillette had been held to be within PL 86-272 "solicitation" by the New York Court of Appeals and that the Department itself had concluded that such Gillette activities in 1974-1975 were within PL 86-272 permitted "solicitation." (App. 20)

Appeals, as incorrect, mistaken and/or not supported by competent, material and substantial evidence in the record.[8]

While Gillette would be pleased to brief and establish in this Supreme Court that the tax tribunal's findings of fact

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[8]The Department argues here that there were five types of activities by Gillette in Michigan which exceeded PL 86-272 "solicitation". The replacement of defective merchandise activity (Department's Brief, pp 34-37), which actually involved less than $4.16 worth of merchandise per salesperson per month, was found to be de minimis by the State's auditor, was purely to assist in soliciting sales and was entirely separate from the established procedures for dealing with defective or rejected merchandise (Appendix F, App. 21). The "actual sales" in Michigan argument (Department's Brief, pp 37-38) misrepresents the facts. These sales were made from a Gillette manufacturer in Illinois to an Illinois purchaser directing shipment from Illinois to its Michigan customer. The tax tribunal, aware of the actual facts, did not list this as an activity exceeding "solicitation." (See Appendix O to Gillette's Petition for a Writ of Certiorari, App. 222-223) (Appendix G, App. 37, contains the testimony on point) The Retail Advertising Agreements (Department's Brief, pp 35-41) were neither negotiated nor accepted by Gillette's salespersons in Michigan and the tax tribunal's finding of fact was wrong (Appendix H, App. 43, illustrates the unresolved issue on appeal). The "Merchandiser Activities" (Department's Brief, pp 41-43) were only established in 1976, not in the later years 1977-1981, and the tax tribunal's factual findings were likewise challenged as incorrect (App. 29-36). Lastly, the "commercial vehicle" argument, not relied upon by the tribunal (Department's Brief, pp 43-45) was challenged as meaningless (Appendix I, App. 47).

were blatantly erroneous on the record there established, and that the Department's factual assertions here are also not supported in the record, this would appear to be an issue better first dealt with by the Michigan appellate courts. The application of the PL 86-272 test to facts established by competent, material and substantial evidence in the record, particularly after this Court's instructive opinion in Wrigley, may not involve issues of sufficient jurisprudential significance to merit review by this Court. The 17 year retroactive enforcement by a state of a new, unforeseeable, far less favorable jurisdictional test against only one potential taxpayer, with all potential taxpayers similarly situated being permitted to avoid the new test, raises serious and significant constitutional issues meriting review by this Court.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari to the Michigan Court of Appeals should be granted.

Respectfully submitted,

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December 1994

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APPENDIX A

STATE OF MICHIGAN

COURT OF APPEALS

THE GILLETTE COMPANY,

Appellant,

v

MICHIGAN DEPARTMENT OF TREASURY,

Appellee.
_____/

Court of Appeals No. 118660

MTT Docket Nos. 73916, 90676 90677

REPLY TO APPELLANT'S SECOND SUPPLEMENTAL BRIEF

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Dated: August 21, 1992

* * *

IV.

THE DEPARTMENT IS SEEKING A UNIFORM NEXUS STANDARD.

Although it is not an issue in this case, some taxpayers are contesting the question of whether PL 86-272 is the property nexus standard for the single business tax. Other taxpayers, including taxpayers represented by Appellant's counsel,[5] have argued that the mere solicitation of sales is sufficient for imposing the single business tax. There are currently pending before the Court two cases, which have been consolidated by the Court, in which the taxpayers contend that the mere solicitation of sales is sufficient nexus for a tax like the SBTA. Guardian Industries Corp v State of

[5]See Amicus Curiae Brief filed by Howmet Corporation in the case of Amway Corporation v State of Michigan, Department of Treasury, Supreme Court No. 85998.

Michigan, Department of Treasury, Revenue Division, Court of Appeals Docket No. 119601, and Cargill Inc, et al v Revenue Division, Department of Treasury, Court of Appeals Docket No. 120048.

These cases represent the opposite side of the coin. In this case Gillette, an out-of-state taxpayer, is maintaining that PL 86-272 shields the extensive activities which is conducts in Michigan from taxation. In contrast, in Cargill and Guardian, which involve a taxpayer shipping goods from Michigan to other states, the taxpayers claim that PL 86-272 is not applicable in determining whether they are taxable in other states because the SBT is not an income tax. Instead, they argue that mere solicitation of sales would make them taxable in other states. Obviously, Michigan taxpayers claiming to be taxable

in other states, unlike Gillette, would favor the extreme minimum standard.[6]

Because these cases involve the opposite side of the same coin, a uniform standard should apply. In its Single Business Tax Bulletin 1980-1, [Exhibit R-5], which was issued May 1, 1980, the Department indicated that it would use the cases decided under PL 86-272 to determine (1) whether an out-of-state business, such as Gillette, was subject to the SBT and (2) whether a Michigan taxpayer was taxable in other states for purposes of the sales factor of the apportionment formula.

* * *

---

[6]If the taxpayer was taxable in other states, sales shipped from Michigan to customers in the other states would be eliminated from the numerator of the sales factor. The ultimate effect would be a reductio of the taxpayer's SBT liability even though no taxes were paid to the other states.

APPENDIX B

STATE OF MICHIGAN

COURT OF APPEALS

MICHIGAN CHROME & CHEMICAL COMPANY,

Plaintiff-Appellant, January 4, 1994

v No. 137977
L.C. No. 100771

DEPARTMENT OF TREASURY,

UNPUBLISHED

Defendant-Appellee.

Before: Griffin, P.J., and Connor and Corrigan, JJ.

PER CURIAM.

Plaintiff appeals as of right a judgment of the Michigan Tax Tribunal affirming tax assessments against it for the years 1979 through 1982 pursuant to Michigan's Single Business Tax Act (SBTA), MCL 208.1 et seq.; MSA 7.558(1) et seq. We affirm.

Plaintiff filed Michigan single business tax returns for the years 1979 through 1982 in which it apportioned its tax base for each year pursuant to § 45 of the SBTA, MCL 208.45; MSA 7.558(45). After an audit, defendant determined that plaintiff had improperly apportioned its tax base because it was not taxable in any other state. Defendant accordingly issued a final notice assessing an SBT deficiency of $64,064.00. Plaintiff appealed to the

tribunal, challenging the assessment. During those proceedings, defendant conceded that petitioner had satisfied its burden of proof relating to seven states in the 1981 tax year. Defendant also conceded that petitioner was taxable in Iowa in the tax years 1979 through 1982. In its opinion and judgment, the tribunal accepted the concessions and found that plaintiff had proven a sufficient nexus for Iowa from 1979 through 1982 and for seven states for 1981. The Tax Tribunal then modified the assessment for the 1979 through 1982 tax years, ordered defendant to recalculate the plaintiff's single business tax liability to account for the concession, and ordered the corrected assessment remitted within 60 days.

In the absence of fraud, our review of Tax Tribunal decisions is limited to whether the tribunal made an error of law or adopted an improper legal principle. Gillette Co v Dept of Treasury, 198 Mich App 303, 306; 497 NW2d 595 (1993); Dow Chemical Co v Dept of Treasury, 185 Mich App 458, 562-463; 462 NW2d 765 (1990). Moreover, we accepted the tribunal's fact findings provided they are supported by competent, material, and substantial evidence. Dow Chemical Co., supra at 462.

Plaintiff correctly points out that defendant and the tribunal made an error of law by improperly applying PL 86-272 as the governing standard. Gillette Co, supra at 309-310; Guardian Industries Corp v Dept of Treasury, 198 Mich App 363, 369; 499 NW2d 349 (1993). The proper standard for determining whether a taxpayer is taxable in other states for purposes of apportionment under MCL 208.42; MSA 7.558(42) is whether the imposition of the

single business tax on the taxpayer is permissible under the due process and interstate commerce clauses, US Const Am XIV; US Const, Art I, § 8, cl 3. Id. at 373. The Guardian case established that a plaintiff can satisfy the requirements of the due process clause by proving that it engaged in mere solicitation of sales in the state in question. Id at 379-380.

However, no remand for further proceedings is necessary on this record. Unfortunately, plaintiff failed to prove any definite link with other states for the years in questions, apart from those states as to which the defendant made the concessions. Plaintiff's president admitted that its sales representatives did not go into some states for three to four years. Plaintiff had also destroyed its business records of out-of-state sales. Plaintiff did not carry its burden of proving solicitation contacts with other states.

Nor need we address plaintiff's Commerce Clause challenge, because plaintiff failed to prove that its activities were sufficient to establish a substantial nexus with foreign states. Plaintiff failed to prove a physical presence in any foreign state for the years 1979 through 1982. Plaintiff was accordingly not entitled to exclude its sales in other states from its tax base under the SBTA.

In light of plaintiff's failure to sustain its burden of proof, we affirm despite the tribunal's use of inappropriate standards; see Gillette and Guardian, supra. In light of the failure of proofs, the outcome would remain the same.

Affirmed.

/s/ Richard Allen Griffin
/s/ Michael J. Connor
/s/ Maura D. Corrigan

APPENDIX C

STATE OF MICHIGAN

COURT OF APPEALS

THE GILLETTE COMPANY,

Petitioner, Appellant,

Court of Appeals No. 118660

vs.

MTT Nos. 73916, 90676 90677

MICHIGAN DEPARTMENT OF TREASURY,

Respondent, Appellee.

_____/

APPELLANT'S ERRATA BRIEF

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* * *

VII.

ONCE THE DEPARTMENT ADMITTED THAT IT HAD UNIFORMLY APPLIED THE PL 86-272 TEST FOR TAXABLE STATUS IN ALL YEARS AT ISSUE, THE TRIBUNAL ERRED BY APPLYING A DIFFERENT STANDARD TO DETERMINE WHETHER GILLETTE WAS TAXABLE IN MICHIGAN FOR THE YEARS 1976-1979

The Tribunal's ruling concerning 1976-1979 adopted a standard for taxable status inconsistent with the longstanding positions of both Parties. While the Parties had disagreed as to how to interpret PL 86-272, not even the Department sought to tax Gillette based on the "solicitation alone" test of its first bulletin, RB 1978-3, subsequently withdrawn. The Department admitted that it had uniformly used PL 86-272 as its test for taxable status. (Answers to Petition ¶9-10). The Tribunal's use of RB 1978-3 for 1976-1979 is simply wrong.

This Court of Appeals need not consider whether PL 86-272 is the correct

test of taxable status in applying the Single Business Tax. PL 86-272 must be applied. To apply a less advantageous nexus test to Gillette than that which was by the Department's own admission uniformly it [sic] applied to all others, would deprive Gillette of equal protection of the law. See IBM v United States, 343 F2d 914 (Court of Claims, 1965); MCI Telecommunications Inc v Department of Treasury, 136 Mich App 28; 355 NW2d 627 (1984), lv den 422 Mich 883 (1985) and Armco Steel v Department of Treasury, 419 Mich 582; 358 NW2d 839 (1984). The Tribunal's use of RB 1978-3 for 1976-1979 is simply wrong.

* * *

APPENDIX D

STATE OF MICHIGAN

COURT OF APPEALS

THE GILLETTE COMPANY,

Appellant,

v

MICHIGAN DEPARTMENT OF TREASURY,

Appellee.
_____/

Court of Appeals No. 118660

MTT Docket Nos. 73916, 90676 90677

BRIEF OF APPELLEE

(Oral Argument Requested)

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* * *

A.

THE DEPARTMENT USES CASES DECIDED UNDER PUBLIC LAW 86-272 AS A GUIDE DETERMINING NEXUS.

As the Department's employees testified at the hearing, the Department uses cases decided under Public Law 86-272 as a guide to determine whether a business has sufficient nexus for imposition of the Single Business Tax Act. (SBTA). PL 86-272 prohibits states from imposing an income tax if the only activity conducted within the state is the solicitation of sales.

Because the SBTA is not an income tax, the Department of Treasury initially determined that PL 86-272 did not apply to SBTA and was not applicable in determining nexus. On March 24, 1978, the Department issued Single Business Tax Bulletin 1978-3 (Exh R-6). In the bulletin, the Department stated that it would follow the decision of

Scripto v Carson, 362 US 207; 80 S Ct 619; 4 L Ed 2d 660 (1960), in determining nexus.

After further analysis, the Department determined that the Scripto test was not appropriate.[2] Consequently, the Department issued Single business Tax Bulletin 1980-1 on May 1, 1980, indicating that it would use the cases decided under PL 86-272 as a guide for determining nexus. (Exh R-5). SBT Bulletin 1980-1 also identified

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[2]On page 10 of the Opinion and Judgment, the Tax Tribunal mistakenly suggested that the Department was using the Scripto v Carson standard in this case in concluding that Gillette's activities went ". . . beyond the Scripto v Carson [382 US 207 (1960)] case as utilized as a guide by the Department during 1978-1979." Contrary to the implication on page 10 of the Opinion and Judgment, the Department maintained throughout the case that the proper standard was PL 86-272, even for the years 1976-1979.

Later in its Opinion and Judgment the Tax tribunal specifically concluded that gillette's activities in Michigan exceeded the activities protected by PL 86-272 for all of the years at issue, 1976-1981. (Opinion and Judgment, pp 16 and 18).

specific business activities which would subject a corporation to the SBTA.

In 1986, the Multistate Tax Commission issued a resolution concerning the Adoption of Statement of Information Concerning Practices of Multistate Tax Commission States Under Public Law 86-272. Although the resolution was issued for informational purposes only, it provides additional examples of what activities exceed solicitation. (Exh P-5).

Since the enactment of PL 86-272, the U.S. Supreme Court has never determined what the term "solicitation" means or exactly what activities exceed solicitation. However, there have been many, many state cases which have applied and interpreted PL 86-272. Many of these cases have recognized that it is not possible to state with certainty what is or is not solicitation and that the determination of whether a corporation's

business activities exceed solicitation of sales requires a case-by-case approach focusing upon the totality of the business activities conducted within the state. Indiana Department of Revenue v Kimberly Clark Corporation, supra.

Many of the state courts have strictly and narrowly construed the term "solicitation". Miles Laboratories v Dept of Revenue, 274 Ore 395; 546 P2d 1081 (1975); Iron Frieman Mfg Co v State Tax Commission, 251 Ore 227; 445 P2d 126 (1968); Clairol Inc v Kingsley, 109 N J Sup 22; 262 A 2d 213; aff'd; 57 N J 199; 270 A 2d 702 (1970) cert den 402 US 902 (1971); Drackett Products Co v Kent Conrad, Tax Commissioner of the State of North Dakota, 370 NW2d 723 (1985). The legislative history of PL 86-272 supports the view that congress intended that "solicitation" be strictly and narrowly construed. See Senate Report No. 658 (August 11, 1959), 2

US Code Cong & Adm. News 2549, 2553 (86th Cong., First Session, 1959).

* * *

APPENDIX E

STATE OF MICHIGAN

DEPARTMENT OF TREASURY

INTER OFFICE

DATE September 17, 1981
TO Louis Wirbel, Chief Hearing Referee
FROM Mary J. Weseloh, Hearing REferee [sic]

SUBJECT OR FILE NO

Gillette Company	RE: Single Business Tax
Prudential Tower Bldg.	Acct. 04-1366970
Boston, MA 02199	Intent to Assess B317729

Hearings were held in relation to the above captioned matter on May 22, 1979 and June 18, 1980. The taxpayer was represented by local counsel, Mr. Samuel J. McKim, by its Tax Attorney, Mr. Joseph J. Newpol, and by Supervisor of State and Local Taxes, Mr. Francis J. Arsenault. The department was represented by Mr. E. Lindstrom and Mr. T. Hoatlin.

The taxpayer does not believe that Michigan has either sufficient contacts or statutory authority to impose the SBT on its activities. The Intent sets out a 1976 deficiency arrived at through audit. Penalty for failure to file is also presented.

Mr. Lindstrom conducted a CIT audit at the same time as this SBT audit. No CIT deficiency was claimed because the department concluded that the taxpayer's

activities were protected by P.L.86-272. A jurisdictional standard other than P.L. 86-272 was in effect at the time of the SBT audit. During the first hearing the department noted that it intended to review its SBT jurisdictional standards. A public statement later resulted from the review. The public statement narrowed the SBT standard from the Northwestern Portland and Stockholm Valve decisions. As Mr. Hoatlin indicated during the second hearing the department now uses P.L.86-272 "plus".

In an April 20, 1981 letter from Mr. Hoatlin facts that the department contends would establish jurisdiction are outlined. The facts are based on information obtained from a current Department of Treasury employee who worked for the taxpayer in Michigan from 1975 through 1978. The taxpayer's June 4, 1981 letter gives its factual presentation. There is actually little disagreement of fact. The disagreement centers around a potential conclusion of "beyond solicitation" in light of the facts.

Do not be lulled into thinking that application of P.L.86-272 is the only issue that has been raised. The taxpayer's August 7, 1979 letter, written during the growth of the general jurisdiction issue, raises a statutory issue. The argument notes that the SBT is imposed upon taxpayers who have business activity in Michigan. According to the taxpayer business activity requires that transfer of title be made in Michigan or that services be performed in Michigan. The August 7, 1979 letter concludes that neither has taken place in the state. There is then no business activity upon which the SBT could be based.

Conclusion

If application of P.L. 86-272 to the facts at hand were presented in a vacuum then the department would have had a chance. An appellate forum would only have had to develope [sic] a meaning to the term "solicitation." That issue, Michigan interpretation of solicitation, is too important to be litigated with this taxpayer. The issue would be diluted by CITs failure to find jurisdiction. It would be further diluted by New York's decision in Gillette v. State Tax Commission, 393 NYS 2d 186, 382 NE2d 764 (1979) (This taxpayer is one of the few multi-state taxpayers that has successfully litigated a P.L. 86-272 case.) The issue would be even further diluted by the taxpayer's "business activities" definitional issue.

The department's P.L. 86-272 "plus" argument simply doesn't have enough additions to off-set its poor posture. For this reason it is my recommendation that the Intent be cancelled.

Respectfully yours,

Mary J. Weseloh
Hearing Referee

MJW:cp

APPENDIX F

STATE OF MICHIGAN

COURT OF APPEALS

THE GILLETTE COMPANY,

Petitioner, Appellant

vs.

Court of Appeals
No. 118660

MTT Nos. 73916,
90676, 90677

MICHIGAN DEPARTMENT OF TREASURY,

Respondent.
_____/

APPELLANT'S ERRATA BRIEF

ORAL ARGUMENT REQUESTED

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* * *

B. The Twelve Gillette Activities which the Tribunal Found Exceeded Permissible PL 86-272 "Solicitation"

1. Replacement of damaged or returned merchandise from the salesperson's stock.

a. The Tax Tribunal's finding of fact.

"Salesmen had supplies of Gillette products in the trunks of their leased cars, which were used to replace damaged or returned products." (Op, p 16) [36]

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[36]The Tribunal had earlier stated that one of the duties of Gillette's salesman included replacing defective merchandise (Op, p 2), and that property of Gillette located in Michigan included some replacement merchandise (Op, p 5). At page 6 of its Opinion, the Tribunal found Gillette property in Michigan, for each of the tax years at issue, included car trunk replacement merchandise (which amounted to $46.96 per employee per year, see discussion, supra, pp 19-22). Property in Michigan also included other permissible merchandise plus the leased cars of Michigan Gillette solicitors, which accounted for the bulk of Gillette property in Michigan.

b. **What was established by competent, material and substantial evidence on the record?**

(1) **Was this activity established?**

The record established that there was a difference between what the Tribunal called "car trunk inventory" (Op, p 12) and "replacement merchandise" (Op, p 5). "Car trunk inventory" or "car stock" consisted of samples, free goods and promotional items (TR 774-748; Op, pp 5-6). All agree, car stock items which were given away by the salesperson did not amount to an activity exceeding "solicitation" (Exhibit P5, p 4 § 2; TR 971-972). Such items were never sold, and such a sale in Michigan would constitute grounds for the salesperson's dismissal (TR 726). In essence, such items were intended to be used as promotional items, but "very rarely" and on a "very limited basis,"

trunk stock samples or promotional items were used to replace a broken or defective item (TR 675, 744-746).

Auditor Horn established the amount of replacement merchandise involved with respect to the 1976 audit, Exhibit R-14, Schedule C-3, p 1. [37] Auditor Horn concluded that replacement goods utilized in Michigan amounted to $46.96 per employee per year (TR 137-138). Mr. Caruso believed this amount to be approximately correct (TR 744-746), and Auditor Gottleib likewise testified that only a very small de minimus amount was involved (TR 299-301). The very rare use of such extremely small amounts of car stock for replacement purposes was established as an exception, and necessary

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[37] The amount was established at $56,574.00 for the entire world. Horn used the Michigan sales factor percentage of 3.3% against the world wide replacement goods figure, and concluded that replacement goods utilized in Michigan wer [sic] $1,867 per year, which divided by the number of employees, gave rise to the amount of $46,96 [sic] per employee per year (TR 137-138).

in order to solicit sales from customers (TR 456-457 744-748). [38]

(2) **For what years was there evidence this activity existed?**

Such rare use of trunk stock for replacement took place in all years.

c. **Would such activity, if deemed established**

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[38] The testimony established a distinction between the replacement of damaged merchandise, a da minimis activity rarely engaged in by salespersons (discussed above), and the regularly carried on Gillette activity relating to the return of damaged or unacceptable merchandise. As to this latter activity, the return of such merchandise was to Gillette's Massachusetts home office, where the return was either accepted or rejected and where credits or other arrangements were made. No car stock replacement was involved. The Gillette Michigan salesperson had no authority with respect to returned goods, other than to assist in notifying the out-of-state home office that such goods would be returned. (See also TR 673-674, 683.) Mr. Mason, the Department's witness, described that the return procedure for smaller retailers and wholesalers consistend [sic] of tagging the merchandise to go back to the company (TR 429).

Deputy Commissioner Hoatlin testified that this procedure, with respect to the return of damaged merchandise, merely amounted to passing along a customer complaint - an activity within PL 86-272 "solicitation" (TR 1053-1054). The return (as opposed to the replacement from car stock) of damaged or unacceptable merchandise was not relied upon by the Tribunal in its findings of fact that Gillette's activities exceeded "solicitation," and is not an issue in this case.

in the record, exceed P L 8 6 - 2 7 2 "solicitation"?

Assuming, arguendo, that the use of part of a salesperson's car stock samples and promotional items in the State of Michigan to replace damaged, defective or unacceptable merchandise could constitute an activity not within PL 86-272 "solicitation", the "very rare" and "very limited" use of a salesperson's car trunk stock for this purpose should come under the de minimus exception to such a rule.

Several of the cases discussed above adopted the view that in applying PL 86-272, de minimus activities should not be considered. See US Tobacco, 386 A2d at 472; Kimberly Clark, 416 NE2d at 1268; Gray & Dudley, 365 SW2d at 34, 39; Coors, 517 P2d at 843; the Wisconsin Wrigley Case, CCH at 14,007. Even Dracket, 370 NW2d at 726, which adopted a narrow view of solicitation, recognized that minor

activities would not control. In US Tobacco, 386 A2d at 481 replacement of stale or damaged goods was specifically held protected. Also see NY Wrigley Case, Lexis, p 4; Wisconsin Wrigley Case, Appendix L, p 13,990; and Kimberly-Clark, 416 NE2d at 1267.

The Department's Auditor Gottleib testified that for his audit purposes he believed such replacement activity was de minimus and did not exceed PL 86-272 "solicitation". He testified that the de minimus approached as also applied by the other Department auditors with whom he spoke (TR 303-304; see Appendix N, Item 1). This is consistent with the de minimus rationale, and is the only competent testimony as to how the Department's

auditors audited for PL 86-272 solicitation purposes. [39]

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[39] Mr. Lynch, the SBT Administrator, however, denied that there was any published or unpublished Department policy whatsoever as to the application of the de minimus rule (TR 590-591). He personally advocated the absurd result which logically follows a refusal to recognize the de minimus concept. This is apparent from his cross-examination (TR 592-594):

"Q [McKim] Let me ask you this. If you had - just to understand where you come from, if you had a taxpayer let's say from Ohio hypothetically, who did nothing in Michigan that was without 86-272. Its activities were in each and every respect clearly with[in] 86-272 "solicitation", except one day its salesman, calling on a customer in Michigan to solicit sales found an irate customer with a ballpoint pen that wouldn't work and the salesman inspecting [expecting], hoping for a sale, an order from the customer said look it happens once in awhile. I've got a new one in my pocket or I've got a new one in my trunk[,] take it. Now give me the purchase order. Does that preclude in your judgment PL 86-272 as a shield from State taxation?

A If he exchanged property one time, I think the protection is lost. I think your example is the extreme, but my answer has to be that given there is no protection for it under PL 86-272.

Q And if the salesman said Mr. Lynch, if I didn't do that that man would have not placed the order. I would not have been able to solicit the sale. It's my part in my view of what I've got to do to get my customers to keep buying my product. Does that change your mind?

A No, sir.

* * *

On cross-examination, Deputy Commissioner Hoatlin, agreed with SBT Administrator Lynch that in his personal opinion there should exist no de minimus rule vis-a-vis a salesperson's replacement of damaged merchandise from car stock (TR 616-617). The positions of the Deputy Commissioner and the SBT Administrator are patently ridiculous. This could not conceivably have been the intent of Congress in enacting the PL 86-272 "solicitation" test.

2. **The activities carried on by 22 part-time Gillette Merchandisers.**

a. **The Tax Tribunal's findings of fact.**

"In 1976, Petitioner employed 22 part-time merchandisers. These merchandisers faced and dusted merchandise, proportioned all racks,

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Q It wouldn't matter whether the pen cost a dollar or even a dime in your opinion if [it is a] replacement technically of damaged merchandise[,] 86-272 is gone. Is that right?

A Yes."

shelves and displays, replaced damaged merchandise, etc. (See Exhibit R-16.) During 1977 to 1981, Petitioner employed a district manager and salesmen who performed activities which included merchandisers functions, but no merchandisers were employed in 1977." (Op, p 16) [40]

b. **What was established by competent, material and substantial evidence on the whole record?**

(1) **Was this activity established?**

(A) **The "Merchandisers".** Mr. Arsenault testified he had advised Auditor Gottleib that he believed generally that "merchandisers" took Gillette merchandise from the customers' back room or storage area to make sure it was displayed attractively and that the shelves were

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[40] Also at page 2 of its Opinion, the Tribunal stated that "[t]he merchandiser's function included placement of production [sic] on customer shelves and keeping management aware of product needs for inventory management." At page 3, the Tribunal referred to one full-time employee of Gillette North America, who, during 1980 and 1981, held the position of Senior District Merchandising Manager ("SDMM"), and who was a Dearborn, Michigan resident.

filled (TR 1098-1099). [41] Auditor Honor knew nothing whatsoever about the merchandisers' activities other than what Arsenault had told him (TR 156-157). Mr. Mason admitted that he never came into contact with merchandisers, but he believed they were used to assist the sales representatives (TR 438). Given that sales representatives do not have time to visit all stores, particularly when they sell to central offices or wholesalers, merchandisers provided assistance in this respect (TR 438). Mr. Mason, however, admitted that such activities were aimed at solicitation of more sales for Gillette and not at performing a service for the customer's customer, as the Department had maintained (TR 449). Mr. Gottleib testified solely based on what Arsenault

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[41] Arsenault also warned Gottleib to verify Arsenault's understandings as to such activities; Gottleib did not (TR 273). (See footnote, 70, pp 36-37.)

had told him, and from an undated "boiler plate" merchandiser job description (R-16, p 4-B1). [42] He found no merchandisers in Michigan during the 1977-1981 period he audited (TR 243-246, 324-325).

Therefore, what arguably the Department proved with respect to merchandisers in Michigan was that in 1976 they moved merchandise from the backroom to fill up shelf space, made certain Gillette goods were displayed attractively (TR 156-157), and encouraged the stores to purchase more Gillette products (TR 438-439).

(B) **Salesmen Taking Over Merchandisers Role**. There was no evidence whatsoever in support of the Tribunal's finding that Gillette's salespersons after 1976 "performed activities which included

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[42] The Tribunal's reference to Exhibit R-16 also apparently relies on the same job description. See discussion on the "job descriptions" the Department relied upon, infra, pp 36-37.

merchandisers functions" (Op, p 16). This aspect of the Tribunal's finding of fact is totally without evidentiary support. (See infra, pp 34-36, for discussion of setting displays).

(C) **The District Merchandising Manager**. Mr. Gottleib read into the record the "duties and responsibilities" of the District Merchandising Manager (TR 232) from the boiler plate job description dated September 1, 1981 (R-16, p 4-A1). On cross-examination, however, he admitted he had no proof that any of these activities were, in fact, carried on in Michigan between 1977 and 1981, the period of his audit (TR 329-334), particularly since he could not even establish that there were any merchandisers in Michigan during those years for the Manager to manage (see

Appendix N, Item 2).[43] The District Merchandising Manager, Mr. Kayner, was on the Department's witness list, but like Auditor Linstrom who believed PL 86-272 applied in 1974-1975, he was never produced by the Department.[44]

(2) **For what years was there evidence this activity existed?**

Mr. Horn testified regarding the tax year 1976 and stated that in 1976 Gillette had 22 part-time merchandisers in Michigan

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[43] There was no evidence that the Senior District Merchandising Manager, Kayner, "performed activities which included merchandisers' functions" as the Tribunal found (Op, p 16). Given that Mr. Kayner was the Senior District Manager of merchandisers, it is highly unlikely that he, himself, could or would attempt to perform the functions formerly performed by his 22 Michigan merchandisers.

[44] The competent evidence of record does not establish that Mr. Kayner performed any acts for Gillette in Michigan during the tax years at issue. This is entirely logical for the years 1977-1981, because he had no employees in Michigan to manage. He may have resided in Michigan, but an employee's residence, as opposed to his actions on behalf of his employer, has never been held to confer taxing jurisdiction over an employer otherwise not taxable in the state.

(TR 13-14). There is no competent evidence in the record that the merchandisers were present in Michigan from 1977 through 1981, the other tax years at issue. [45] Based on the evidence in the record, it is unclear whether any of the alleged activities of the District Merchandising Manager actually took place, or if they did, whether they took place in Michigan during 1977-1981. (See discussion above.)

The impact, if any, of Gillette merchandisers or its District Merchandising Manager in Michigan is, accordingly, limited solely to the year 1976.

c. **Would such activity, if deemed established in the record, exceed P L 8 6 - 2 7 2 "solicitation"?**

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[45] Although Mr. Gottlieb (TR 242) attempted to imply that merchandisers were in Michigan during 1977 or 1978, he later conceded on cross-examination that he was unable to place merchandisers in Michigan during the 1977-1981 years he audited (TR 324-325).

No. As was discussed supra, pp 14-18, such merchandiser type activities were precisely those undertaken and held taxable in Brown-Forman, 101 So2d 70, which had prompted PL 86-272. (The Brown-Forman employees sought to obtain suitable displays in stores of their customers' customers, in which they neither solicited nor accepted orders. By pushing the product in retail stores, Brown-Forman would sell more to its wholesale customers.) PL 86-272 was enacted to legislatively change that result. The activities of merchandisers have been considered and held within solicitation in the NY Gillette Case, see Appendix C, p 7 also see 393 NYS2d at 188; the NY Wrigley Case, Appendix K, Lexis p 4, US Tobacco, 386 A2d at 472, and the Wisconsin Wrigley Case, Appendix L at CCH 14006; and Kimberly-Clark, 416 NE2d 1266.

* * *

APPENDIX G

STATE OF MICHIGAN

MICHIGAN TAX TRIBUNAL

GILLETTE,

Petitioner(s),

-vs-

MICHIGAN DEPARTMENT OF TREASURY,

Respondent(s).

No(s): 73916, 90676 and 90677
JUDGES: Koney & Darnell
VOLUME VII
pp. 874 - 1039

The Hearing of above matter, taken before Sherry L. Sullivan, CSR 3334, Certified Shorthand Reporter, within and for the County of Macomb, State of Michigan, at 144 E. Lafayette, 13th Floor, Detroit, Michigan, on April 1, 1987 commencing at about 9:30 in the forenoon.

APPEARANCES:

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Appearing on behalf of Petitioner(s).

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Appearing on behalf of Petitioner(s).

* * *

D I R E C T E X A M I N A T I O N

BY MR. McKIM:

Q. Mr. Arsenault, you recall that you were on the stand as a witness for the Respondent earlier and you have been sworn and you're still under oath?

A. Yes.

* * *

Q. What was the essence of the sales tax audit that Mr. Horn first conducted at that time?

A. Sales and use tax, the sales tax portion of it was conducted at La Grange Park, Illinois a company which we referred to as Specialty and Industrial or Incentive, excuse me, which was a pen and printing business and I have to go back a little bit in a narrative for you. We acquired a

company called Autopoint which for an accountant would know that's the producer of a double-ended mechanical pencil. That company was acquired by Gillette in 1971 and it sold its product to end users who required the names to be put on the pen and they sold it through sales representatives. Those sales representatives made direct sales to end users. Autopoint charged the sales tax for Michigan and paid that sales tax. On or about 1974, maybe the beginning of 1975 that corporation was liquidated and merged into Papermate Company. Its method of doing business now transformed. It did not only, in fact it phased out its sales representatives and it sold through wholesalers. In my opinion, it need not have collected sales tax now because it would be selling subject to resale. There was a waning

end of direct sales and unfortunately or fortunately which ever the case might be, they, that company when it was liquidated re-registered as if they would be collecting the sales tax. Is that explanation enough?

Q. What is an end user?

A. You and I are end users of a product.

Q. Somebody who's not going to resell the product?

A. That's correct. And hopefully everybody in the room with respect to Gillette products.

Q. I'm not entirely clear yet on why the state said that -- did the state suggest that Gillette owed sales taxes?

A. What the sales tax auditor did is he took out a series of invoices. The invoices were to, all the ones that he selected were to Illinois wholesalers who issued to us an Illinois resell

certificate and asked that we drop shipped goods, via the common carrier, to a point within Michigan and Michigan auditor asked if we had a Michigan resale certificate for that delivery into state and we said we did not. We had the Illinois because we were selling to the man, wholesaler in Illinois. To the extent that we could not get from the Illinois wholesaler a Michigan resale certificate, we paid a sales tax on that sale.

Q. Were there any activities involved on behalf of Gillette by its salesmen selling the Autopoint product which went beyond the sort of the solicitation that you heard testified to by --

A. Do you want to say this again please.

Q. I'll try. Were there any activities involved by Gillette's salespersons selling the Autopoint product during

the years to which the sales tax audit related which went beyond the sort of the solicitation that you have described and that Mr. Caruso described?

A. No. They were not.

Q. Was inventory shipped from out of state?

A. Yes, it was.

Q. Any orders accepted in the state?

A. No orders were accepted in the state.

* * *

APPENDIX E

STATE OF MICHIGAN

IN THE COURT OF APPEALS

THE GILLETTE COMPANY,

Petitioner-Appellant,

vs.

Court of Appeals
No. 118660

MICHIGAN DEPARTMENT OF TREASURY,

Respondent-Appellee.
_____/

APPELLANT'S SUPPLEMENTAL BRIEF

ORAL ARGUMENT REQUESTED

MILLER, CANFIELD, PADDOCK AND STONE
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Dated: April 12, 1991

* * *

4. The Retail Advertising Display Agreements With Gillette's Michigan Customers.

The Department in this case has stated,

> "The fourth specific activity which exceeded solicitation was the Retail Advertising/Display Agreements between Gillette and its customers in Michigan .....
>
> As indicated on the Retail Advertising/Display Agreement (Exh R-51), the sales representative plays an integral role in the execution and performance of the agreement between the customers and Gillette. Under the terms of agreements the sales representative has authority to approve advertising. The customer must submit the Advertising/Display Agreement to the Gillette Sales Representative no later than 30 days after the performance date. Finally, the Agreement provides a space for the customer's signature and the Gillette salesman's signature. The activities concerning the Retail Advertising/Display Agreement, including execution of the agreement itself, are all activities which exceed the solicitation of sales." (Department's Brief pp 31-32).

The Department has again misrepresented the facts. It was clear

that the Gillette sales person sent the agreement to Massachusetts for acceptance, and performed only the role of explaining its use in Gillette sales promotions to the Gillette customer in Michigan. (Trial Transcript Volume VI, pp 777-781).

The Wisconsin Supreme held,

> "Regarding the advertising, it too is an important part of soliciting orders. As a medium to alert potential customers of the existence and availability of a company's product, the appearance of Wrigley's ads in Wisconsin are incidental to solicitation of orders for the product." (Wrigley slip opinion p 30).

The critical factor here is that Gillette's sales persons had no power to enter into an agreement in Michigan with Gillette's customers, and their involvement was to explain and facilitate Gillette's program to enable them to sell more Gillette products to their customers.[7] The

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[7]The Tax Tribunal, which heard the testimony on the so-called Retail Advertising/Display Agreements, did not refer to the Department's

parallel between the Wrigley and Gillette solicitation activities is obvious. This is because such organizations must engage in such activities to solicit the sale of their products. The Wisconsin Supreme Court was correct, the Michigan Tax Tribunal was wrong, this type activity clearly did not go beyond the permitted "solicitation" of orders, but rather were incidental to and a part of such solicitation of orders.

* * *

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assertions as an activity by Gillette which exceeded solicitation in Michigan. It is only the Department's misrepresentation of the facts in the record which would make it appear so here.

APPENDIX I

STATE OF MICHIGAN

MICHIGAN TAX TRIBUNAL

THE GILLETTE COMPANY,

Petitioner,

vs.

MTT Consolidated
Docket Nos. 73916,
90676, 90677

MICHIGAN DEPARTMENT OF
TREASURY,

Respondent.
_____/

PETITIONER'S POST-HEARING CLOSING ARGUMENT AND BRIEF

Respectfully submitted,

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Dated: August 10, 1987

* * *

6. **The 1981 Fuel Tax License**

The Department offered only the testimony of Mr. Thelen, an office manager in the Motor Fuel Tax Division of the Department of Treasury in connection with the fuel tax issue. Through him Exhibits R27 and R28 were introduced.

The Department's assertions that Gillette was doing something with a single truck in Michigan in the year 1981 came belatedly in this case, and are made by documents from which no such legitimate inference can be drawn. It is apparent only that a leasing company was involved, and that Gillette's name was used as the licensee. The testimony was that a single truck was apparently involved in a single year, although not what kind of truck or what type activity it was involved in. We do not know who owned the truck, how at all if the truck was leased, whose employee

drove the truck, where the truck traveled or what the truck did.

This is an excellent example of how far the Department will go to attempt by inference and innuendo to buttress its totally inadequate proofs that Gillette engaged in more than that "solicitation" permitted under PL 86-272. The Department has conducted at least four separate audits of this taxpayer, beginning in 1977 over ten years ago. Yet in this context, and recognizing the Department has the burden of proof of establishing jurisdiction, the Department attempts to cloud the issues with proofs so abysmally inadequate as these. This is both inadequate and unfair. Respondent proved nothing with these exhibits.

* * *